Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-213

BYRON L. DORGAN, as State Tax Commissioner of and for the State of North Dakota, and his successors in office; STATE TAX COMMISSION OF THE STATE OF NORTH DAKOTA; and STATE OF NORTH DAKOTA,

Appellants

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY, INCORPORATED,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

COUNSEL OF RECORD FOR ALL APPELLANTS, AND UPON WHOM SERVICE IS TO BE MADE:

KENNETH M. JAKES
Special Assistant Attorney General for the State of North Dakota
Office of the State Tax Commissioner
State Capitol
Bismarck, ND 58505

OTHER COUNSEL OF RECORD FOR ALL APPELLANTS:

ALBERT R. HAUSAUER, ROBERT W. WIRTZ
Special Assistants Attorney General for the State of North Dakota
Office of State Tax Commissioner
State Capitol
Bismarck, ND 58505

August, 1976

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. ____

BYRON L. DORGAN, as State Tax Commissioner of and for the State of North Dakota, and his successors in office; STATE TAX COMMISSION OF THE STATE OF NORTH DAKOTA; and STATE OF NORTH DAKOTA,

Appellants,

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY, Incorporated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

JURISDICTIONAL STATEMENT

Appellants (all of the defendants in the Court below) appeal from the order of the United States District Court for the District of North Dakota entered on May 17, 1976, by a three-judge District Court, granting the appellees' Motion For Order Staying, Pending a Final Determination In This Action, State Administrative Proceedings, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The Memorandum and Order of the three-judge District Court for the District of North Dakota, Southeastern Division, is reported in 413 F.Supp. 173. Separate findings of fact and conclusions of law were not made by the District Court. A copy of the Memorandum and Order is attached hereto as Appendix A.

Other reports of this proceeding delivered in the courts below are United States v. Dorgan, 385 F.Supp. 349 (D.C. N.D. 1974), a copy of which is attached hereto as Appendix B, and United States v. Dorgan, 522 F. 2d 969 (8th Cir. 1975), a copy of which is attached hereto as Appendix C.

JURISDICTION

This proceeding was brought under Title 28, United States Code, Section 2281, by the appellees for an interlocutory injunction to enjoin the enforcement of the North Dakota retail sales and use tax laws. The order of the

three-judge District Court granting the interlocutory injunction was entered on May 17, 1976, and notice of appeal was filed in that court on June 16, 1976. The jurisdiction of the Supreme Court to review this order by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the order on direct appeal in this case: Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310; Phillips v. United States, 312 U.S. 246; Query v. United States, 316 U.S. 486; Department of Employment v. United States, 385 U.S. 355; and United States v. Dorgan, 522 F. 2d 969.

QUESTIONS PRESENTED

In its order entered May 17, 1976. granting appellees' motion for an order staying, pending a final determination in their action for declaratory judgment, the state administrative tax assessment proceedings, did the three-judge District Court abuse its discretion in one or more of the following respects:

1. By failing to make any finding of fact to support its conclusion that the showing made by the appellees demonstrated a substantial probability of success on the merits, that is, raised serious questions under the Constitution of the United States of the validity of the North Dakota retail sales and use tax laws or some provision thereof.

2. By failing to make any finding of fact to support its conclusion that appellee United States would suffer irreparable injury if the state administrative tax assessment proceedings were not restrained.

3. By finding that appellee Western Electric Company, Inc., would suffer irreparable injury if the state administrative tax assessment proceedings were not restrained -

   (a.) by presuming, without citation of statutory or case law authority, that the United States could not be a party to the state administrative tax assessment proceedings;

   (b.) by holding that the expenditure of resources by Western Electric Company, Inc., in the simultaneous litigation of identical issues in the courts of the state and in the courts of the United States would constitute irreparable injury to it.

4. By failing to comply with the requirement of Rule 65(d) of the Federal Rules of Civil Procedure that every order granting an injunction shall set forth the

reasons for its issuance.

5. By failing to stay the proceedings before it until the parties obtained an interpretation of the North Dakota sales and use tax laws in the North Dakota courts determining whether or not those laws exempted Western Electric Company, Inc., from sales and use taxes on the purchases it made to carry out its contract with the United States Army.

STATUTES INVOLVED

Although the Three-Judge District Court apparently concluded that the North Dakota retail sales and use tax laws as applied to appellee Western Electric Company, Inc., are probably unconstitutional under the Constitution of the United States, no particular provision of those laws is specifically designated in its Memorandum and Order as being in possible violation of the Constitution. For that reason there is appended hereto as Appendix D the complete text of those laws, which are Chapter 57-39.2 (the retail sales tax law), and Chapter 57-40.2 (the use tax law) of the North Dakota Century Code. Also appended hereto as part of Appendix D is a copy of each of the following sections of the Administrative Agencies Practice Act of the North Dakota Century Code: Sections 28-32-08, 28-32-13, 28-32-15, and 28-32-19.

STATEMENT OF THE CASE

Western Electric Company, Inc., hereinafter referred to as Western Electric, contracted with the United States Army to furnish services and supplies, including equipment, for the design, production and installation of equipment in the Safeguard antiballistic missile defense system at missile bases in North Dakota. The contract provided for Western Electric to furnish the services and supplies as an independent contractor and not as an agent of the Government. The contract also provided that the United States would reimburse Western Electric for sales and use taxes that Western Electric became liable for and paid.

The equipment which Western Electric was required by this contract to install was installed in large, massive concrete structures several stories in height extending both above and below ground level. These concrete structures, which are located in northeastern North Dakota, were specially designed to house the equipment installed by Western Electric and they were constructed for the Army by a different contractor. This proceeding does not involve that contractor who built the concrete structures nor does it involve any question of that contractor's liability for North Dakota retail sales and use taxes on services and materials purchased by it and installed or otherwise used or consumed by it in the construction of those structures and the completion of its contract with the Army.

Over four years ago, in the spring of 1972, numerous discussions began between the appellant North Dakota State Tax Commissioner, hereinafter referred to as Tax Commissioner, and his representatives with representatives of Western Electric and the United States Army on the question of the liability of Western Electric for North Dakota retail sales and use taxes with respect to purchases it made for completion of the Safeguard system in North Dakota. The Tax Commissioner asserted that Western Electric was, (1), liable for retail sales taxes on purchases it made in North Dakota of such services as telephone service, electricity, gas and water and on purchases it made in North Dakota of such tangible personal property as supplies, materials and equipment and, (2), that it was liable for use taxes on similar purchases made by it outside of North Dakota and used, stored or consumed by it in North Dakota. Agreement between the Tax Commissioner and Western Electric and the Army was not reached on the question of the sales and use tax liability of Western Electric. The Tax Commissioner initiated a sales and use tax audit in the spring of 1974 of Western Electric's accounting and other records relating to purchases allocated to that company's Safeguard contract, but only preliminary audit work was done at that time.

On July 23, 1974, the appellees United States and Western Electric, filed an action for declaratory judgment in the United States District Court for the District of North Dakota asking for

judgment declaring that the North Dakota sales and use tax laws as applied to Western Electric's purchases under the contract were unconstitutional on the grounds (1) that to the extent they are applied to Western Electric but not to other contractors in similar factual circumstances, such action discriminates against the United States and Western Electric in violation of the Supremacy Clause of the Constitution of the United States, and (2) that insofar as the Tax Commissioner would seek to impose the taxes on sales by Western Electric to the United States, said imposition is unconstitutional as infringing upon the immunity of the United States, guaranteed by the Constitution of the United States, from state taxation, in that the legal incidence of said taxes falls upon the United States; the appellees further asked for judgment declaring that various provisions of the North Dakota sales and use tax laws exempted Western Electric from those taxes. The complaint did not ask for any injunctive relief. The appellants answered the complaint on August 13, 1974, denying the appellees' claims that Western Electric was not liable for the taxes and praying that the complaint be dismissed on principles of comity, or that the District Court stay the proceedings before it pending a determination in the state courts of the correct interpretation of the North Dakota sales and use tax laws as applied to Western Electric's purchases under the contract, or that the Court enter a declaratory judgment ordering and adjudging Western Electric to be liable for the taxes imposed by law with respect to those purchases.

On July 24, 1974, the Tax Commissioner issued a "Notice of Determination" to Western Electric which Western Electric received on July 26, 1974. The Notice of Determination was a determination by the Tax Commissioner that the amount of $54,078,756.98 was due and owing from Western Electric for sales and use taxes for the period beginning April 1, 1971, and ending December 31, 1973, and that the tax would become finally and irrevocably fixed unless within fifteen days after Western Electric received the Notice it applied to the Tax Commissioner for a hearing, at which hearing Western Electric could produce evidence that the determination of tax was incorrect. The Notice of Determination was issued at that time to avoid the possible running of a three year period of limitation within which the taxes could be assessed.

Upon request of counsel for Western Electric, the Tax Commissioner granted an extension of time to August 26, 1974, within which Western Electric could apply to the Tax Commissioner for a hearing. By letter dated August 21, 1974, counsel for Western Electric applied to the Tax Commissioner for a hearing on the Notice of Determination.

Before a date was set by the Tax Commissioner for the hearing, the appellees on September 24, 1974, served their "Motion For Order Staying, Pending a Final Determination In This Action, State Administrative Proceedings" on the Tax Commissioner and other defendants.

Oral argument on the motion for the stay order was set by the single judge District Court for November 8, 1974, and following argument on that date the Court entered its memorandum and order on December 5, 1974, granting the motion to stay and restraining the appellants from proceeding with the administrative tax proceedings initiated by the appellant Tax Commissioner. See United States v. Dorgan, 385 F.Supp. 349, a copy of which is appended hereto as Appendix B. On January 31, 1975, the Tax Commissioner and other appellants filed their Joint Notice of Appeal, appealing the District Court's stay order of December 5, 1974, to the 8th Circuit Court of Appeals. That court on September 10, 1975, vacated the stay order on the grounds that the single judge District Court did not have jurisdiction to issue the stay order restraining the appellants from enforcing the North Dakota sales and use tax laws, and it ordered the convening of a three-judge District Court to pass on the injunctive relief sought. See United States v. Dorgan, 522 F. 2d 969, a copy of which is appended hereto as Appendix C. The appellees did not seek a review by the United States Supreme Court of that decision.

A three-judge District Court was convened and on April 5, 1976, it heard the appellees' motion for the stay order. The Court did not permit the testimony of any witnesses to be taken but it did permit the appellees to show a film of, first, the development and test-firings of the Spartan and Sprint missiles that were later deployed as part of the Safeguard anti-

ballistic missile system in North Dakota, and, second, views of the sites where the missiles were installed in North Dakota and exterior views of the concrete buildings in North Dakota in which the electronic and other equipment for operation of the Safeguard system was installed by Western Electric. Voluminous exhibits offered by the appellees were received by the Court, subject to its consideration of any written objections to their admission that might be filed by counsel for the appellants within ten days. Counsel for appellants did file written objections to most of the exhibits offered but have not been advised which of those exhibits, if any, were admitted into evidence. Prior to the April 5, 1976, hearing, counsel William L. Shraberg for the United States had filed his own affidavit dated January 13, 1976, in support of the motion to stay, and at the April 5th hearing Western Electric's counsel Frank J. Magill filed on behalf of the appellees his own affidavit, dated April 5, 1976, in support of the motion. The Court authorized counsel Kenneth M. Jakes for the appellants to file within ten days after the hearing any affidavits he desired and he then filed his own affidavit in opposition to the motion for stay. Prior to the November 8, 1974 hearing before the single judge District Court of the appellees' motion to stay, counsel for the United States, Michael B. Andolina, filed his affidavit, dated September 18, 1974, in support of the motion to stay, and on November 8, 1974, counsel for appellants, Kenneth M. Jakes, filed his affidavit,

dated November 7, 1974, in opposition to the motion to stay.

On May 17, 1976, the Three-Judge District Court issued its Memorandum and Order, 413 F.Supp. 173, granting the appellees' motion and restraining the appellants from proceeding with the administrative tax proceedings initiated by the Tax Commissioner, except that the Tax Commissioner was permitted to continue his audit of Western Electric's books and records. See the copy of the Memorandum and Order attached hereto as Appendix A. The Court did not make separate findings of fact and conclusions of law.

On June 16, 1976, Notice of Appeal to the Supreme Court of the United States from the May 17, 1976 Order of the Three-Judge District Court was filed by the appellants (all of the defendants below) with the Clerk of the United States District Court for the District of North Dakota, Southeastern Division. A copy of the Notice of Appeal is appended hereto as Appendix E.

THE QUESTIONS ARE SUBSTANTIAL

When it granted Appellees' motion for an order for preliminary injunction restraining the enforcement of the North Dakota sales and use tax laws, the Court below abused its discretion, first, because its Memorandum and Order do not include findings of facts and conclusions of law that are either adequate or sufficiently explicit to constitute fair compliance with Rule 52(a) of the Rules

of Civil Procedure as required in Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316-317; Interstate Circuit, Inc. v. United States, 304 U.S. 55, 56; and Public Service Commission v. Wisconsin Telephone Co., 289 U.S. 67, 69-70; second, because the conclusions of law include erroneous conclusions; and, third, because the order itself does not comply with the requirement of Rule 65(d) of the Rules of Civil Procedure that every order granting an injunction shall set forth the reasons for its issuance.

The Court did not indicate any recognition of the principle that it is in the public interest that federal courts should at all times be actuated by a scrupulous regard for the rightful independence of state government and by a proper reluctance to interfere by injunction with their fiscal operations where the asserted federal right may be preserved without it. Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298. Instead, the Court was actuated by the right of the United States to its choice of forum for the determination of the action for declaratory judgment rather than by a determination of whether the traditional prerequisites for injunctive relief were present, as is shown by the following statements in its memorandum opinion:

> "The right to a choice of forum is the issue presented to the Court on Plaintiffs' motion, which is corollary to one of the basic issues in the litigation, on whom does the incidence of the tax fall, and

possible immunity." (App. A-4.)

> "The subject matter of the contracts to be litigated is a vehicle of the sovereign's implementation of a system of national defense, and the United States has alleged an interest which it is entitled to litigate in a forum of its choice." (App. A-7.)

The District Court did not recognize that "different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief on the other." Steffel v. Thompson, 415 U.S. 452, 469, quoting from Roy v. Wade, 410 U.S. 113, 116. See also, United States v. Dorgan, 522 F. 2d 969, 973 (App. C-9).

After acknowledging (App. A-2) the Court of Appeal's ruling in the related decision in United States v. Dorgan, 522 F. 2d 969, 973 (App. C-10 and 11) that "movants must satisfy the traditional prerequisites for injunctive relief, a substantial probability of success on the merits, and irreparable injury", the Court below said that it "finds the traditional prerequisites of injunctive relief to be present." (App. A-2 and A-3). But its order granting the preliminary injunction should be vacated because its memorandum opinion does not include findings of facts sufficient or explicit enough to support that ultimate conclusion. See Mayo v. Lakeland Highlands Canning Co., Interstate Circuit Inc. v. United States, and Public Service Commission v. Wisconsin Telephone

Co., supra.

1. The Court's statement (App. A-5) that the United States had made a substantial showing that under its contract with Western Electric it would be required to pay any amount of sales and use tax ultimately determined to be due the State of North Dakota arising out of the contract does not indicate in any way that the sales and use tax laws as applied to Western Electric may be unconstitutional but only that the pecuniary interest of the United States that is represented by this contract provision gives the federal courts jurisdiction over the action for declaratory judgment. Similarly, the Court's statements (App. A-6) that the legal issues are substantial and that there appears a substantial probability that the Plaintiffs may prevail on their contentions that all or part of the taxes assessed may not be owed are also ultimate conclusions and do not address themselves to the question of whether the appellees showed a substantial probability that those laws are unconstitutional. The fact, if eventually established, that the dollar amount of sales and use taxes assessed to Western Electric may be excessive and therefore erroneous as to amount is not a showing by appellees from which the Court might properly conclude that there is a substantial probability that the sales and use tax laws as applied to Western Electric are unconstitutional but is at most only a showing "of the unconstitutionality of the result obtained by use of a statute". Ex. parte

Bransford, 310 U.S. 354, 361. Also see Leonard v. Mississippi State Probation and Parole Board, 509 F. 2d 820, 821-823 (C.A. 5, 1975). If the dollar amount of a tax assessed is erroneous because excessive, that simply shows that the statute was incorrectly applied, not that the statute may be unconstitutional. In this regard counsel for Western Electric has acknowledged to the District Court that some North Dakota sales and use tax is owed by Western Electric.

The District Court's conclusion that there is a substantial probability that the sales and use tax laws as applied to Western Electric are unconstitutional without indicating why is not alone enough to support this requirement for a preliminary injunction. Did it base this conclusion on an unstated finding that the purchases were probably made directly by the United States or that Western Electric was its agent for that purpose and that therefore immunity from taxation applied? Or was its conclusion based upon some other unstated finding bearing on the constitutional question? The Court's memorandum opinion does not tell us and it therefore abused its discretion in granting the preliminary injunction.

2. Parties applying for a preliminary injunction must also show that they would be irreparably injured if it is not granted. The United States is not excepted from this requirement, as the 8th Circuit Court of Appeals held in its related decision in United States v. Dorgan, 522 F. 2d 969, 973 (App. C-10 and 11). But the District Court's memorandum and order no where include any finding or

indication of how the United States would be irreparably injured if the preliminary injunction had not been granted. The Court's statement (App. A-5) that the United States made a substantial showing that under its contract it would be required to pay any amount of sales and use tax ultimately determined to be due the State of North Dakota arising out of the contract cannot be regarded as a finding of irreparable injury to the United States. Payment of a contractual obligation in an amount ultimately determined to be due is simply payment of a legal obligation and cannot possibly constitute irreparable injury to the one contracting party who was legally obligated to pay it to the other contracting party. The granting of the preliminary injunction by the District Court without making any finding of fact showing irreparable injury to appellee United States is an abuse of the Court's discretion and requires that its order granting the preliminary injunction be vacated.

3. The Court in its memorandum opinion found that Western Electric would be irreparably injured if the preliminary injunction were not granted because, since it was the only party to the state proceeding (App. A-5), a final judgment reached in the state proceeding prior to final judgment in the declaratory judgment action pending in the District Court would be res judicata as to Western Electric but would not bind the United States, and if the final judgment of the District Court should find Western Electric not liable for the tax, Western Electric would be caught between two conflicting judgments.

This of course assumes that the final judgment in the state proceeding would find Western Electric liable for tax. The Court apparently assumed that the United States either could not be a party to the state administrative proceeding or, under its right to a choice of forum, would choose not to be. To the extent that the Court may have concluded that the United States could not be a party to the state administrative proceedings, its conclusion was erroneous because it did not take into account Sections 28-32-08, 28-32-13 and 28-32-15 of the North Dakota Century Code (App. D-107, 108 and 109), which are provisions of the Administrative Agencies Practice Act governing the procedure for administrative proceedings and which provide, in Section 28-32-08, for service of written specifications of issues on all interested parties and an opportunity to be heard thereon, in Section 28-32-13 for service of the agency's administrative decision on all parties, and in Section 28-32-15 for a right of appeal to the appropriate state district court by any partyto the proceeding. Application of Bank of Rhame, 231 N.W. 2d 801 (N.D. 1975). The fact that the Tax Commissioner's administrative hearing determination would be limited on appeal by Section 28-32-19 (App. D-109) to a review on the record would not constitute irreparable injury to Western Electric or present any constitutional infirmity, Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 348-349, although the Court seems to argue otherwise (App. A-4).

The fact that some additional expense

might be incurred by Western Electric if the state administrative tax proceedings are allowed to continue is not an adequate reason for interfering in the administration of the state's tax laws, Miller v. City of Greenville, Miss., 138 F. 2d 712, 719, (C.A. 8, 1943), and does not constitute irreparable injury. Although the District Court found and concluded otherwise (App. A-6).

4. The District Court's order granting the preliminary injunction and specifying the acts restrained (App. A-7) does not comply with the requirement of Rule 65(d) of the Federal Rules of Civil Procedure that every order granting an injunction shall set forth the reasons for its issuance. The order gives no reason and its deficiency in this respect requires that it be vacated. Withrow v. Larkin, No. 73-1573, _____U.S._____, 95 S.Ct. 1456, 1463.

5. In their complaint seeking declaratory judgment, the United States and Western Electric not only asked for judgment declaring that the North Dakota sales and use tax laws as applied to Western Electric are unconstitutional but also for judgment declaring that various provisions of the North Dakota sales and use tax laws exempted Western Electric from those taxes (see Statement of the Case, pages 7 and 8, supra). To the extent, if any, that Western Electric is exempt under the sales and use tax laws from the taxes in question, a final determination to that effect by the North Dakota Supreme Court would make the

federal constitutional question moot. Kusper v. Pontikes, 414 U.S. 51, 54-55. The District Court, however, in granting the preliminary injunction was, as already noted, primarily concerned with the right of the United States to its choice of a forum and apparently therefore gave no consideration to the advisability of staying its own proceedings pending a final determination in the state courts of the proper construction of the sales and use tax laws as applied to Western Electric's activities under the contract. Under these circumstances where interpretation of state tax laws is at issue in a federal declaratory judgment action, the United States Supreme Court has held that the federal courts should abstain from construing the state tax laws so that the parties can then proceed in the state courts for such a determination. Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101. This is so even though the United States is one of the parties seeking declaratory relief. Leiter Minerals, Inc. v. United States, 352 U.S. 220, 228-229. Any federal constitutional issues remaining after construction of the state's tax laws by the state courts can then be reviewed and resolved in the federal courts as was done in the second Spector Motor case, Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, in which the Connecticut tax law as construed by the Connecticut Supreme Court was declared unconstitutional by the United States Supreme Court after the latter had ordered the federal courts to abstain from determining issues of Connecticut law until the parties resolved those issues in the Connecticut courts.

These principles of comity and federalism on which the abstention doctrine is grounded were given apt recognition in a federal declaratory judgment action involving a state tax law in Great Lakes Dredge & Dock Co. v. Huffman, supra, where this Court said (319 U.S. at 298):

> "It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.
>
> "'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved.' Matthews v. Rodgers, supra, 284 U. S. at pages 525, 526, 52 S.Ct. at pages 219, 220, 76 L.Ed. 447."

The order granting the preliminary injunction from which this appeal is taken should be vacated and the District Court instructed to determine if there is uncertainty in how the exemption provisions in the North Dakota sales and use tax laws would apply to Western Electric's activities under its contract, and it should be further instructed that if it finds that there is such uncertainty it should abstain from proceeding with the declaratory judgment action until the interpretation of the sales and use tax laws is determined in the North Dakota courts. Leiter Minerals, Inc. v. United States, supra, 352 U.S. at 228-229.

It is submitted that the District Court abused its discretion by granting the preliminary injunction without setting forth adequate and explicit findings of facts and conclusions of law either separately or in its memorandum opinion and that it abused its discretion by not setting forth in its order the reasons for granting the injunction. We believe the

questions submitted by this appeal are substantial, that they involve an important state interest, Swift & Company v. Wickham, 382 U.S. 111, 127, and that they are of public importance.

Respectfully submitted,

Kenneth M. Jakes

COUNSEL OF RECORD FOR ALL APPELLANTS:
Special Assistant Attorney
General for the State of
North Dakota
Office of the State Tax
Commissioner
State Capitol
Bismarck, ND 58505

OTHER COUNSEL OF RECORD FOR ALL
APPELLANTS:
Albert R. Hausauer, Robert W.
Wirtz
Special Assistant Attorneys
General for the State of
North Dakota
Office of State Tax Commissioner
State Capitol
Bismarck, ND 58505

August, 1976

APPENDIX A

(Pages App. A-1 through App. A-8)

413 F.Supp. 173

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NORTH DAKOTA

SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY, INCORPORATED,	)
Plaintiffs,	)
v.	)
BYRON L. DORGAN, as State Tax Commissioner of and for the State of North Dakota, and his successors in office; STATE TAX COMMISSIONER OF THE STATE OF NORTH DAKOTA; and STATE OF NORTH DAKOTA,	)
Defendants.	)

CIVIL NO. A3-74-68

FILED and Entered United States District Court, District of North Dakota, May 17, 1976, Cletus J. Schmidt, Clerk

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MEMORANDUM AND ORDER

Before BRIGHT, Circuit Judge, BENSON and VAN SICKLE, District Judges.

Benson, District Judge.

Plaintiffs, United States of America and Western Electric Company, Incorporated, have renewed their motion before this three-judge court, for an order staying, pending a final determination in this action, state administrative tax assessment proceedings. The Eighth Circuit Court of Appeals reversed an order of the trial court 1/ granting such a stay, ruling a single federal judge was without jurisdiction to issue "an interlocutory injunction against enforcement of a state statute before the state has an opportunity for full hearing on its constitutional merits." United States v. Dorgan, 522 F.2d 969, 972 (8th Cir. 1975). The injunctive relief sought can only be granted by a three-judge district court. United States v. Dorgan, supra, at 973. The Court of Appeals further ruled the movants must satisfy the traditional prerequisites for injunctive relief, a substantial probability of success on the merits, and irreparable injury.2/

After a hearing on the motion, this Court, for reasons that follow, finds the traditional prerequisites of

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1/ See, United States v. Dorgan, 385 F.Supp. 349 (D. N.D. 1974). Both the District Court opinion as well as the Circuit opinion carry a summary of pertinent facts.

2/ Footnote is on the following page.

2/

"A party seeking a preliminary injunction is required to demonstrate the traditional prerequisites for injunctive relief. Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225, 77 S.Ct. 287, 1 L.Ed. 2d 267 (1957). Movants must also demonstrate a substantial probability of success on the merits and irreparable injury. See Minnesota Bearing Co. v. White Motor Corp., 470 F. 2d 1323, 1326 (8th Cir. 1973)." United States v. Dorgan, 522 F.2d 969, 973 (8th Cir. 1975).

injunctive relief to be present.

The right to a choice of forum is the issue presented to the Court on Plaintiffs' motion, which is corollary to one of the basic issues in the litigation, on whom does the incidence of the tax fall, and possible immunity. The United States courts alone can finally determine this basic issue, because the United States cannot be forced to submit to state court jurisdiction. See, Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957).

Under a NDCC Section 57-39.2-15 administrative procedure, the State Tax Commissioner of the State of North Dakota, to avoid the possible running of a three year period of limitation, levied a sales and use tax assessment in the amount of $54,078, 56.98 against Western Electric, which by law, would become finally and irrevocably fixed unless Western Electric made application for a NDCC Chapter 28-32 administrative hearing. In the administrative hearing, the burden would be on Western Electric to produce evidence that the tax determination was incorrect. On an appeal from a tax commissioner's administrative hearing determination the judicial review permitted by statute is limited to a review of the record. See, NDCC 28-32-19.

At the hearing before this three-judge United States District Court, it was brought out that the tax commissioner's determination of use and sales tax owed was made without audit, and it appears that it was probably based on gross estimates of materials and ser-

vices purchased and consumed in the implementation of the contract between the United States and Western Electric for the design, production and installation of equipment for use in the Safeguard anti-ballistic missile defense system located within the State of North Dakota.

The United States has made a substantial showing before this Court that under its contract with Western Electric, it would be required to pay any amount of sales and use tax ultimately determined to be due the State of North Dakota arising out of the contract.

Only Western Electric is a party to the state proceedings. If a final judgment should be reached in the state proceedings before the final judgment is rendered in the action now pending in this Court, the state judgment would be res judicata as to Western Electric. Such a judgment would not bind the United States. If the final judgment of this Court should find Western Electric not liable for the tax, Western Electric would be caught between two conflicting judgments. It would be bound by the state judgment to pay the tax and at the same time, the United States, in reliance on the final judgment of this Court, could refuse to reimburse Western Electric. As a result of conflicting judgments, Western Electric would be forced to accept a loss which could be

substantial. In addition, Western Electric would be compelled to litigate identical issues simultaneously in the courts of the State and in the courts of the United States. The expenditure of resources in such simultaneous litigation and the unusual risk incident to the litigation constitutes "irreparable injury".

The legal issues in this case are substantial. Aside from the immunity issue, there is a substantial issue of whether sales and use tax consequences arose from the implementation of the United States-Western Electric contract, and if such tax consequences arose, the amount of those taxes. Considering the fact that the tax assessment was arrived at without audit and on the basis of an estimate, there appears a substantial probability that Plaintiffs may prevail on their contentions that all or a part of the taxes assessed may not be owed.

In Leiter, the Supreme Court was concerned with the possibility of a conflict in the outcome of state and federal court proceedings.

> "[S]ince the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum in this case, even though the state [action] has the elements of an action characterized as quasi in rem. We therefore hold that the District Court properly exercised its jurisdiction to entertain the suit in federal court and to prevent the effectuation of state

> court proceedings that might conflict with the ultimate court judgment." 352 U.S. at 228.

That same concern is present here, and where the federal government has a pecuniary interest in enjoining state collection proceedings, United States v. Arlington County, Virginia, 326 F.2d 929 (4th Cir. 1964), as where it is obligated by contract to reimburse its contractor for state taxes, United States v. Department of Revenue of State of Illinois, 191 F.Supp. 723 (D. Ill. 1961), that interest weighs heavily in favor of staying state proceedings seeking to impose taxes upon the contractor. Here the United States has alleged such an interest.

The subject matter of the contracts to be interpreted is a vehicle of the sovereign's implementation of a system of national defense, and the United States has alleged an interest which it is entitled to litigate in a forum of its choice.

IT IS ORDERED Plaintiffs' motion to stay is GRANTED. Defendants, and all persons in active concert or participation with them, are restrained from proceeding with the administrative tax proceedings initiated by the Defendant Tax Commissioner, pending a final determination in this case. 3/

3/ Footnote is on following page

Dated this 17th day of May, 1976.

/s/Myron H. Bright

MYRON H. BRIGHT, JUDGE
UNITED STATES COURT OF APPEALS

/s/Paul Benson

PAUL BENSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

/s/BRUCE M. VAN SICKLE

BRUCE M. VAN SICKLE, JUDGE
UNITED STATES DISTRICT COURT

3/ The parties have advised the Court that the North Dakota State Tax Commissioner is proceeding with an audit relating to the claim of North Dakota for sales and use tax obligations against Western Electric Company. The stay herein in no way affects the auditing arrangement heretofore agreed to by Western Electric Company, nor preliminary steps which the State of North Dakota, through its tax commissioner, may take to ascertain the potential sales and use tax liability of Western Electric Company, arising out of the conracts in question in this proceeding.

APPENDIX B

(Pages App. B-1 through App. B-12)

385 F.Supp. 349

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NORTH DAKOTA

SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY, INCORPORATED,

Plaintiffs,

vs.

BYRON L. DORGAN, as State Tax Commissioner of and for the State of North Dakota, and his successors in office; STATE TAX COMMISSION OF THE STATE OF NORTH DAKOTA; and STATE OF NORTH DAKOTA,

Defendants.

CIVIL NO. A3-74-68

FILED United States District Court, District of North Dakota Dec 5 1974, Cletus J. Schmidt, Clerk

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MEMORANDUM AND ORDER

On the grounds that it is necessary in the aid of this Court's jurisdiction and to protect Federal interests of the United States of America, the plaintiffs have filed a motion with this Court for an order staying, pending a final determination in the case, administrative proceedings instituted by the defendant taxing authorities of the State of North Dakota. Defendants resist the motion.

The above entitled action was filed in this Court on July 23, 1974. The relief sought is a declaratory judgment:

> "That Western Electric is not liable for any sales or use taxes of the State of North Dakota to the extent that it provides tangible personal property and services to the Department of the Army under its contract for the design, production and installation of equipment for use in the SAFEGUARD antiballistic missile defense system located with the State of North Dakota."
>
> "That the United States and Western Electric are not liable for any sales or use taxes of the State of North Dakota by virtue of the SAFEGUARD Contract."

On July 26, 1974, three days after the action was filed, Plaintiff Western Electric Company, Incorporated (Western Electric), received from Defendant State Tax Commissioner of the State of North Dakota (Tax Commissioner), pursuant to Section 57-39.2-15 and section 57-40.2-13 North Dakota Century Code (NDCC),

1/ a "Notice of Determination" that sales and use taxes in the amount of $54,078, 756.98 was due from Western Electric for the period beginning April 1, 1971, and ending December 31, 1973. The Notice

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1/

"57-39.2-15. FAILURE TO FILE RETURN -INCORRECT RETURN.--If a return required by this chapter is not filed, or if a return when filed is incorrect or insufficient the commissioner shall determine the amount of tax due from such information as he may be able to obtain, and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and other factors. The commissioner shall give notice of such determination to the person liable for the tax. Such determination shall fix the tax finally and irrevocably unless the person against whom it is assessed, within fifteen days after the giving of notice of such determination, shall apply to the commissioner pursuant to chapter 28-32 for a hearing or unless the commissioner of his own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the commissioner shall give notice of his decision to the person liable for the tax pursuant to the provisions of chapter 28-32."

advised Western Electric "...the tax due will become finally and irrevocably fixed unless within fifteen days after you receive this notice you apply to the Tax Commissioner for a hearing, at which hearing you may produce evidence that this determination of tax is incorrect."

To preserve its rights to contest the determination and without waiving its rights to pursue its remedy in this Court, Western Electric made application to the Tax Commissioner for a hearing, and at the same time filed its motion with this Court for the stay order. In resisting the motion for a stay order, defendants do not dispute the jurisdiction of the federal court to hear the case on its merits or to issue a stay order staying the State administrative proceedings. Jurisdiction in the case is based on 28 U.S.C. §§1345, 2201, 1331 and 1332.

The complaint alleges, in substance, that since about April 1, 1968, Western Electric, under contract with the Department of the Army, an agency of the United States of America, has been engaged in the design, production, and installation within the State of North Dakota, of an anti-ballistic missile defense system designated

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"57-40.2-13. PROVISIONS OF SALES TAX LAW APPLICABLE.--The provisions of chapter 57-39.2, pertaining to the administration of the retail sales tax, including provisions for refund or credit provided therein, not in conflict with the provisions of this chapter, shall govern the administration of the tax levied in this chapter."

"SAFEGUARD", which is a complex computer, radar, electronic missile system requiring the procurement within and without the State of North Dakota, for installation within North Dakota, of large quantities of tangible personal property.

It is alleged that tangible personal property owned by the United States and furnished by the Department of the Army to Western Electric was included in the property procured by Western Electric, and that title to such property remained in the United States. It is further alleged that title to all property procured by Western Electric in carrying out the contract, passes directly from the vendor to the United States as purchaser, and that the property at all times remains tangible personal property which cannot be considered as improvement to real estate. The complaint further alleges that the Safeguard Contract requires the Department of the Army to reimburse Western Electric for all allowable costs incident to the performance of the contract, including any and all state and local taxes properly due and owing.

Defendants generally deny the allegations of the complaint, and specifically deny that title to any tangible personal property procured by Western Electric incident to its performance of the Safeguard Contract passes to the United States as purchaser, either from Western Electric or from the vendor, and allege that Western Electric is liable for sales and use taxes of North Dakota on its purchase price of all tangible personal property and services procured

by it for use or consumption in its performance of the Safeguard Contract, and used or consumed by it in the State of North Dakota.

Defendants urge that the concept of comity and federalism necessary in maintaining the delicate balance of federal and state judicial functions will be best served by a denial of the motion to stay. They assert that when the facts in this action are determined, they will parallel those in The Boeing Company and the United States v. Omdahl, 169 N.W. 2d 696 (N.D. 1969), so closely that the holding of that case will compel a holding that Western Electric is liable for North Dakota sales and use taxes. Defendants argue that such a determination is a construction of the tax laws of North Dakota, which finally can be made only by the North Dakota Supreme Court, and which they contend would be controlling on the federal courts. They suggest that the federal court should abstain, so that the parties can proceed in state court for a determination of the issue,2/

2/ "57-39.2-16. APPEALS.--1. An appeal may be taken by the taxpayer to the district court of the county in which he resides, or in which his principal place of business is located, within thirty days after he shall have received notice from the commissioner of his determination as provided for in section 57-39.2-15. The appeal shall be taken pursuant to and in accordance with chapter 28-32."

and then any federal constitutional issues remaining after construction of the tax laws by the state courts can be resolved in the federal courts.

Plaintiffs' response is that the state law in this case is clear and not at issue, that the issues relate to alleged infringement by the State upon the Constitutional immunity of the United States, and that it is a matter of factual determination and application of federal procurement law to ascertain if the incidence of the taxes asserted by the State fall upon the United States as vendee of the personal property involved. Plaintiffs assert further that the federal forum is the forum of choice because the United States has an absolute right to apply to the federal courts for determination of interests effecting the sovereign. Plaintiffs also point out that the United States is not a party to the administrative proceedings commenced by the State after the United States filed its action, which administrative proceedings appear to be designed and intended to lead to the adjudication of the tax controversy in the state courts.

"28-32-21. REVIEW IN SUPREME COURT. --The judgment of the district court in an appeal from a decision of an administrative agency may be reviewed in the supreme court on appeal in the same manner as any case tried to the court without a jury may be reviewed, except that the appeal to the supreme court must be taken without three months after the service of the notice of

entry of judgment in the district court."

It is the view of this Court that the ultimate issue to be determined whether the matter is litigated in state or federal court is: On whom does the incidence of the tax fall? The United States and Western Electric allege that the incidence would fall on the United States, and by their pleadings, they have placed in issue not an interpretation of the North Dakota tax laws, which appear to be clear and unambiguous, but the question of federal immunity under the facts alleged in the case. A determination by the state courts on this issue is not binding on the federal court. See First Agricultural National Bank of Berkshire County v. State Tax Commissioner, 392 U.S. 399 (1968), and abstention is not required, see United States v. Nevada Tax Commission, 439 F. 2d 435 (9th Cir. 1971).

The question remaining is should the State administrative proceedings be stayed? 28 U.S.C. §2283 provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

This section has been held not to be applicable when the United States seeks to protect what it alleges to be federal interests.

"The statute is designed to prevent conflict between federal and state courts. This policy is much more

compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent irreparable injury to a national interest. The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of court proceedings except under the severe restrictions of 28 U.S.C. §2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. §2283 alone." Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225, 226 (1957); In Accord N.L.R.B. v. Roywood Corp., 429 F.2d 964 (5th Cir. 1970); United States v. Certified Industries, Inc., 361 F.2d 857 (2nd Cir. 1966); Eden Memorial Park Association v. United States, 300 F.2d 432 (9th Cir. 1962); United States v. Farmers State Bank, 249 F.Supp. 579 (D.S.D. 1966).

28 U.S.C. §1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assignment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

It has been repeatedly held that this section is not applicable where a United States plaintiff seeks to enjoin state tax proceedings.

> "[W]e conclude, in accord with an unbroken line of authority and convincing evidence of legislative purpose, that §1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." Department of Employment v. United States, 385 U.S. 355, 358 (1966); United States v. Arlington County, Virginia, 326 F. 2d 929 (4th Cir. 1964); United States v. Bureau of Revenue of State of New Mexico, 291 F. 2d 677 (10th Cir. 1961); United States v. Department of Revenue of State of Illinois, 191 F.Supp. 723 (N.D. Ill. 1961).

This Court has reached a determination that it would be appropriate for it to exercise what appears to be its discretaionary power to stay the State administrative proceedings. The following factors were considered in reaching that determination.

1. The action in federal court is the only one that could finally determine the basic issue in litigation. See Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957). Since the United States is not a party to the State proceedings, its interests relating to federal procurement law and immunity could not be directly litigated in the State action.

An adjudication of the federal immunity question in the State courts adverse to the United States would not be final.

2. In Leiter, the Supreme Court was concerned with the possibility of a conflict in the outcome of State and federal court proceedings.

"[S]ince the position of the United States is essentially a defensive one, we think that it should be permitted to choose the forum in this case, even though the state action has the elements of an action characterized as quasi in rem. We therefore hold that the District Court properly exercised its jurisdiction to entertain the suit in federal court and to prevent the effectuation of state court proceedings that might conflict with the ultimate federal court judgment." at 228.

That same concern is present here.

3. Where the federal government has a direct pecuniary interest in enjoining state collection proceedings, United States v. Arlington County, Virginia, 326 F. 2d 929 (4th Cir. 1964), as where it is obligated by contract to reimburse its contractor for state taxes, United States v. Department of Revenue of State of Illinois, 191 F.Supp. 723 (D. Ill. 1961), that interest weighs heavily in favor of staying state proceedings seeking to impose taxes upon

the contractor. Here the United States has alleged such an interest.

4. The subject matter of the contracts to be interpreted herein is a vehicle of the sovereign's implementation of a system of national defense, and the United States has alleged an interest which it is entitled to litigate in a forum of its choice.

5. The simultaneous litigation of the same issues in state and federal court would mitigate against the concept of comity and federalism, and would be upsetting to the delicate balance of federal and state judicial functions.

IT IS ORDERED plaintiffs' motion to stay is GRANTED. Defendants and all persons in active concert or participation with them are restrained from proceeding with the administrative tax proceedings initiated by the Defendant Tax Commissioner, pending a final determination in this case.

Dated this 5th day of December, 1974.

/s/Paul Benson
PAUL BENSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

(Pages App. C-1 through App. C-12)

522 F. 2d 969

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 75-1090

United States of America *
and Western Electric *
Company, Incorporated, *
*
Appellees *
*
vs. *
*
Byron L. Dorgan, as State Tax *
Commissioner of and for the *
State of North Dakota, and his*
successors in office; State *
Tax Commission of the State of*
North Dakota and State of *
North Dakota, *
*
Appellants. *

Appeal from the United States District Court for the District of North Dakota

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Submitted: May 16, 1975

Filed: September 10, 1975

Before LAY and STEPHENSON, Circuit Judges, and REGAN, District Judge.*

LAY, Circuit Judge.

The United States and Western Electric seek a declaratory judgment that North Dakota sales and use taxes are unconstitutional as applied to Western Electric's purchases under a defense contract. In essence, they argue that Western Electric acts under the contract as a federal instrumentality and therefore enjoys the immunity of the Federal Government.

Western Electric contracted with the Army to design and install certain equipment at "Safeguard System" missile bases in North Dakota. When North Dakota informally evidenced an intention to tax the defense contractor, the United States and Western Electric filed this action seeking declaratory relief. The next day North Dakota's Tax Commissioner issued a "Notice of Determination", asserting that Western Electric owed in excess of $54 million in sales and use taxes and that the tax would become final unless Western Electric applied for an administrative hearing. Western Electric requested a hearing, but before one was held, the district court granted the government's motion for an order staying the state administrative proceedings

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*THE HONORABLE JOHN K. REGAN, United States District Judge, Eastern District of Missouri, sitting by designation.

pendente lite. From this interlocutory order the State Tax Commissioner appeals, urging that the district court abused its discretion in granting the stay.

We need not reach that issue, however, for we find that the district court was without jurisdiction to issue the stay.[1] Under 28 U.S.C. § 2281, a three-judge district court must be convened to grant injunctive relief under the circumstances existing here. Section 2281 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the

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1. An order staying proceedings before another court or administrative body is an order granting an injunction and therefore appealable under 28 U.S.C. § 1292(a)(1). See Penoro v. Rederi A/B Disa, 376 F. 2d 125, 128 (2nd Cir. 1967); accord, Firestone Tire & Rubber Co. v. International Union, 476 F. 2d 603, 604-05 (5th Cir. 1973); Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F. 2d 577 (1st Cir. 1969); Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 189 F. 2d 31 (3rd Cir. 1951), aff'd. 342 U.S. 180 (1952). See also 9 J. Moore, Federal Practice ¶ 110.20[1], at 235 (2d ed. 1973).

> action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The government urges that since the constitutional challenge to the state statute is based on the Supremacy Clause, under Swift & Co. v. Wickham, 382 U.S. 111 (1965), a three-judge court is not required to enjoin enforcement of the state statute. In Swift, however, only the construction of two statutes, one state and one federal, was at issue rather than an interpretation of the Federal Constitution. More on point is Department of Employment v. United States, 385 U.S. 355 (1966). There the Red Cross and the United States sued as coplaintiffs to enjoin application of Colorado's unemployment compensation taxes to the Red Cross on the ground that it was a federal instrumentality immune from state taxation. A three-judge court had granted the injunction. When jurisdiction was challenged on direct appeal to the Supreme Court, that Court held:

> Any challenge to the applicability of the three-judge court provision, 28 U.S.C. § 2281, is foreclosed by this Court's decision in Query v. United States, 316 U.S. 486 (1942),

> where the Court held that three judges were required to entertain a suit to enjoin a state tax statute sought to be enforced against an Army Post Exchange which asserted its immunity as a federal instrumentality, and we do not consider that our later decision in Swift & Co. v. Wickham, 382 U.S. 111 (1965), requires a different conclusion.

385 U.S. at 357.

The government next asserts that this order was not an injunction upon the ground of unconstitutionality within the meaning of § 2281, and that instead this order is governed by 28 U.S.C. § 2283 as necessary in aid of the court's jurisdiction.[2] The government urges that the stay was aimed at aiding the district court to reach a substantive determination, and was not a substantive determination itself. The argument is premised on

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2. 28 U.S.C. § 2283. Stay of State Court Proceedings

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Where the United States seeks to restrain the assessment and collection of state taxes an injunction is not barred under 28 U.S.C. § 2283. See Department of Employment v. United States, 385 U.S. 355, 358 (1966); Leiter Minerals, Inc. v. United States, 352 U.S. 220, 225-26 (1957).

the assumption that the three-judge court requirement of § 2281 does not apply to injunctions in aid of jurisdiction under § 2283. [3]

In analyzing this contention, it is helpful to review the history of the three-judge court statute and the background of the Declaratory Judgment Act, 28 U.S.C. § 2201. The original purpose of the predecessor to § 2281 is discussed

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3. It can be argued that § 2283 is inapplicable here, not only because the United States is seeking the stay but because there was no pending state court proceeding. All that had taken place was the mailing to Western Electric of a tax assessment notice and the scheduling of an administrative hearing. Section 2283 has been held not to apply at all unless there is a currently pending state court proceeding. See Engelman v. Cahn, 425 F. 2d 954, 958 (2nd Cir. 1969) (Friendly, J.), cert. denied, 397 U.S. 1009 (1970); Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F. 2d 387 (5th Cir. 1969), cert. denied, 397 U.S. 910 (1970). If § 2283 does not apply then the power if any to issue this order must come from 28 U.S.C. § 1651 of the All Writs Act.

in Goldstein v. Cox, 396 U.S. 471 (1970), where the Court observed:

> As originally enacted, the Three-Judge Court Act required that no interlocutory injunction restraining the operation of any state statute on constitutional grounds could be issued, except by a three-judge court, and provided that "[a]n appeal may be taken directly to the Supreme Court of the United States from the order granting or denying . . . an interlocutory injunction in such case." 36 Stat. 557. The Act grew out of the public furor over what was felt to be the abuse by federal district courts of their injunctive powers in cases involving state economic and social legislation. While broad and radical proposals were made to deal with the problem, including proposals to deprive the federal courts of all jurisdiction to enjoin state officers, Congress compromised on a provision that would deal with what was felt to be the worst abuse--the issuance of temporary restraining orders and preliminary injunctions against state statutes, either ex parte or merely upon affidavits, and subject to limited and ineffective appellate review. See Phillips v. United States, 312 U.S. 246, 250 (1941); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 803-810 (1934); Note, The Three-Judge District Court and Appellate Review, 49 Va.L.Rev. 538, 539-543 (1963).

396 U.S. at 476 (emphasis added).

Thus, the very abuse at which the statute was aimed is the remedy the government requests here: a single federal judge issuing an interlocutory injunction against enforcement of a state statute before the state has an opportunity for a full hearing on its constitutional merits. In Steffel v. Thompson, 415 U.S. 452 (1974) the Court expanded the historical perspective:

> A "storm of controversy" raged in the wake of Ex parte Young, focusing principally on the power of a single federal judge to grant ex parte interlocutory injunctions against the enforcement of state statutes. . . . This uproar was only partially quelled by Congress' passage of legislation, 36 Stat. 557, requiring the convening of a three-judge district court before a preliminary injunction against enforcement of a state statute could issue, and providing for direct appeal to this Court from a decision granting or denying such relief. See 28 U.S. C. §§ 2281, 1253. From a State's viewpoint the granting of injunctive relief--even by these courts of special dignity--"rather clumsily" crippled state enforcement of its statutes pending further review. . . . Furthermore, plaintiffs were dissatisfied with this method of testing the constitutionality of state statutes, since it placed upon them the burden of demonstrating the traditional prerequisites to equitable relief--most importantly, irreparable injury. See, e.g., Fenner v. Boykin, 271 U.S. 240, 243 (1926).

Id. at 465-66.

Thus, in view of the onerous burden cast on a party requesting injunctive relief, the Declaratory Judgment Act was created to enable a federal court to determine the constitutionality of a statute without issuing a preliminary injunction with its coercive effect. As stated in Perez v. Ledesma, 401 U.S. 82 (1971):

> The express purpose of the Federal Declaratory Judgment Act was to provide a milder alternative to the injunction remedy. . . .
> . . . .
> . . . . Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt.

Id. at 111, 126.

If the government's position is correct, and a single judge under § 2283 (or § 1651) may enjoin enforcement of a state statute by granting a stay in aid of its jurisdiction, then the government has discovered an easy way to circumvent the Congressional purpose in requiring three judges to hear such cases. Under the government's approach, a litigant could avoid the requirements of § 2281 merely by seeking declaratory relief before a single judge and then moving to stay the state proceeding in which the statute is being enforced. The trial court's characterization of its order as simply in aid of its jurisdiction or as in fact issued on the substantive grounds of irreparable harm and probability of

success on the merits is of little moment. 4. The coercive effect is the same, and the provisions of § 2281 require three judges to grant the injunctive relief. 5.

A party seeking a preliminary injunction is required to demonstrate the traditional prerequisites for injunctive relief. Leiter Minerals, Inc. v. United

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4. Appropos here is Board of Managers v. George, 377 F.2d 228, 231 (8th Cir.), cert. denied, 389 U.S. 845 (1967):

> It would clearly be a "contradiction of reason" to attempt to enjoin the state from enforcement of a statute and at the same time not pass upon the constitutionality of the statute. Cf. United States ex rel. McNeill v. Tarumianz, 3 Cir., 242 F.2d 191.

5. Under present law, a three-judge court is required even when the constitutional challenge is made to the statute "as applied" as in the instant case. See Department of Employment v. United States, 385 U.S. 355, 356 (1966); Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 292 (1923).

States, 352 U.S. 220, 225 (1957). 6. Movants must demonstrate a substantial probability of success on the merits and irreparable injury. See Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323, 1326 (8th Cir. 1973). 7. It is not clear whether under the plaintiffs' view of the statutes the movant would still be required to demonstrate these prerequisites. If not, the plaintiffs' argument circumvents not only § 2281's requirement of a three-judge court but also the heavy burden required for the issuance of a preliminary injunction.

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6. In Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957), the United States sought a stay of state court proceedings, alleging and proving irreparable injury. The Supreme Court stated:

> There can be no doubt, apart from the restrictions of 28 U.S.C. § 2283, of the right of the United States to enjoin state court proceedings whenever the prerequisites for relief by way of injunction be present.

Id. at 225 (emphasis added). (The Supreme Court went on to hold that § 2283 was inapplicable to the United States when it was a plaintiff).

7. Other factors relevant to the determination of whether a preliminary injunction should issue are inadequacy of a remedy at law and consideration of other equities such as harm to others and to the public interest. See Economic Development Corp. v. Model Cities Agency No. 74-1976 (8th Cir., June 30, 1975);

Under the circumstances we do not pass on whether the court abused its discretion by granting the stay or in refusing to abstain in deference to the state administrative proceeding. We hold that a single judge was without jurisdiction to enter a preliminary injunction against the enforcement of the state statute when a declaration of unconstitutionality of the statute was the relief sought. The motion for the stay required the district court to request a three-judge court to pass on the injunctive relief sought.

The stay is vacated and the cause remanded to the district court for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Minnesota Bearing Co. v. White Motor Corp., supra at 1326.

APPENDIX D

NORTH DAKOTA CENTURY CODE:

Chapter 57-39.2, Sales Tax, pages App. D-1 through App. D-67.

Chapter 57-40.2, Use Tax, pages App. D-68 through App. D-105

Sections 28-32-08, 28-32-13, 28-32-15 and 28-32-19 of Administrative Agencies Practice Act, pages App. D-106 through D-110

NORTH DAKOTA CENTURY CODE

ANNOTATED

REPLACEMENT VOLUME 11

CHAPTER 57-39.2 - SALES TAX

CHAPTER 57-39.2

SALES TAX

SECTION	
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57-39.2-26	Allocation of revenue.
57-39.2-27	Disposition of excess tax collections.

57-39.2-01. DEFINITIONS.--The following words, terms, and phrases, when used in this chapter, have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

1. "Person" includes any individual, firm, partnership, joint adventure, association, corporation, estate, business trust, receiver, or any other group or combination acting as a unit and the plural as well as the singular number.
2. "Sale" means any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration, and includes the furnishing or service of steam, gas, electricity, water, or communication, the furnishing of hotel, motel or tourist court accommodations, the furnishing of tickets or admissions to any place of amusement, athletic event or place of entertainment including the playing of any machine for amusement or entertainment in response to the use of a coin, and sales of subscriptions to magazines and other periodicals regardless of whether or not such magazines or periodicals are to be delivered in the future and regardless of whether or not they are in existence at the time of the sale of any

subscription; provided that the words "magazines and other periodicals" as used herein shall not include newspapers nor shall they include magazines or periodicals that are furnished free by a nonprofit corporation or organization to its members or because of payment by its members of membership fees or dues.

3. "Retail sale" or "sale at retail" means the sale, including the leasing or renting, to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property; the sale of steam, gas, electricity, water, and communication service to retail consumers or users; the ordering, selecting or aiding a customer to select any goods, wares, or merchandise from any price list or catalog, which the customer might order, or be ordered for such customer to be shipped directly to such customer; the sale or furnishing of hotel, motel, or tourist court accommodations, tickets, or admissions to any place of amusement, athletic event or place of entertainment including the playing of any machine for amusement or entertainment in response to the use of a coin; and the sales of magazines and other periodicals. By the term "processing" is meant any

tangible personal property including containers which it is intended, by means of fabrication, compounding, manufacturing, producing, or germination shall become an integral or an ingredient or component part of other tangible personal property intended to be sold ultimately at retail. The sale of an item of tangible personal property for the purpose of incorporating it in or attaching it to real property shall be considered as a sale of tangible personal property for a purpose other than for processing; the delivery of possession within the state of North Dakota of tangible personal property by a wholesaler or distributor to an out-of-state retailer who does not hold a North Dakota retail sales tax permit shall not be considered a taxable sale. As used in this subsection the word "consumer" shall include any hospital, infirmary, sanatorium, nursing home, home for the aged, or similar institution that furnishes services to any patient or occupant.

4. "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

5. "Retailer" includes every person engaged in the business of leasing or renting hotel,

motel, or tourist court accommodations, and every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or furnishing of steam, gas, electricity, water and communication services, or tickets or admissions to places of amusement, entertainment and athletic events including the playing of any machine for amusement or entertainment in response to the use of a coin, or magazines, or other periodicals; and shall include any person as herein defined who by contract or otherwise agrees to furnish for a consideration a totally or partially finished product consisting in whole or in part of tangible personal property subject to the sales tax herein provided, and all items of tangible personal property entering into the performance of such contract as a component part of the product agreed to be furnished under said contract shall be subject to the sales tax herein provided and the sales tax thereon shall be collected by the contractor from the person for whom the contract has been performed in addition to the contract price agreed upon, and shall be remitted to the state in manner provided in this chapter; and shall include the state or any municipality furnishing steam, gas, electricity,

water, or communication service to members of the public in its proprietary capacity.

6. "Gross receipts" means the total amount of sales of retailers, valued in money, whether received in money or otherwise, provided, however, that discounts for any purposes allowed and taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. Provided, further, however, that when tangible personal property is taken in trade or in a series of trades as a credit or part payment of a retail sale taxable under this chapter, if the tangible personal property traded in will be subject to the sales tax imposed by this chapter when sold or will be subject to the motor vehicle excise tax imposed by chapter 57-40.3, the credit or trade-in value allowed by the retailer shall not be regarded as gross receipts. Provided, further, however, that on all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof that only such portion

of the sale amount thereof shall be accounted for, for the purpose of imposition of tax imposed by this chapter, as has actually been received in cash by the retailer during each quarterly period as defined herein. "Gross receipts" shall also mean, with respect to the leasing or renting of tangible personal property, the amount of consideration, valued in money, whether received in money or otherwise, received from the leasing or renting of only such tangible personal property the transfer of title to which has not been subjected to a retail sales tax in this state. "Gross receipts" shall also mean, with respect to subscriptions to magazines and other periodicals, the amount of consideration, valued in money, wheter received in money or otherwise, received from the sale of such subscriptions regardless of whether or not such magazines or periodicals are to be delivered in the future and regardless of whether or not they are in existence at the time of the sale of any subscription.

7. "Relief agency" means the state, any county, city and county, city or district thereof, or any agency engaged in actual relief work.
8. "Commissioner" means the tax commissioner of the state of North Dakota.

9. "Local governmental unit" means incorporated cities, counties, school districts and townships.

SOURCE: S.L. 1967, ch. 459 §1; 1969, ch. 519, §1; 1969, ch. 529, §1; 1971, ch. 566, §1.

57-39.2-02. SALES TAX IMPOSED.-- Except as otherwise expressly provided by this chapter, there is hereby imposed a tax of two and one-quarter percent upon the gross receipts of retailers from all sales at retail including the leasing or renting of tangible personal property as hereinafter provided in this section, within the state of North Dakota the following to consumers or users:

1. Tangible personal property, consisting of goods, wares, or merchandise.
2. The furnishing or service of steam, gas, electricity, water, or communication services.
3. Tickets or admissions to places of amusement or entertainment or athletic events, including amounts charged for participation in an amusement, entertainment or athletic activity, and including the playing of any machine for amusement or entertainment in response to the use of a coin.
4. Magazines and other periodicals, including subscriptions thereto.
5. The leasing or renting of hotel, motel, or tourist court accommodations for periods of less than thirty consecutive calendar days or one month.
6. The leasing or renting of

tangible personal property the transfer of title to which has not been subjected to a retail sales tax under this chapter or a use tax under the provisions of chapter 57-40.2.

In the case of a contract awarded for the construction of highways, roads, streets, bridges, and buildings prior to April 1, 1967, the contractor receiving the award shall be liable only for the sales or use tax at the rate of tax in effect on the date of contract.

SOURCE: S.L. 167, ch. 459, §3; 1967, ch. 460, §1.

57-39.2-03. SEPARATE AND ADDITIONAL TAX ON RETAIL SALES.--There is hereby imposed a tax of three-quarters of one percent, which tax shall be in addition to any other tax provided for by law, upon the gross receipts of retailers from all sales at retail including the leasing or renting of tangible personal property as hereinafter provided in this section within the state of North Dakota of the following to consumers or users:

1. Tangible personal property, consisting of goods, wares, or merchandise.
2. The furnishing or service of steam, gas, electricity, water, or communication services.
3. Tickets or admissions to places of amusement or entertainment or athletic events, including amounts charged for participation in an amusement, entertainment, or athletic activity, and including the

playing of any machine for amusement or entertainment in response to the use of a coin.
4. Magazines and other periodicals, including subscriptions thereto.
5. The leasing or renting of hotel, motel, or tourist court accommodations for periods of less than thirty consecutive calendar days or one month.
6. The leasing or renting of tangible personal property the transfer of title to which has not been subjected to a retail sales tax under this chapter or a use tax under the provisions of chapter 57-40.2.

In the case of any contract awarded for the construction of highways, roads, streets, bridges, and buildings prior to April 1, 1967, the contractor receiving the award shall be liable only for the sales tax at the rate of tax in effect on the date of contract.

All definitions of terms, provisions for collection and delinquency, exemptions, assessments, penalties, refunds, notices and appeals, and all other provisions contained and provided for in this chapter, and any other provisions of law now in effect or which may become effective relating to the retail sales tax, shall apply and are hereby made applicable to the tax imposed under the provisions of this section.

SOURCE: S.L. 1967, ch. 460, §7; 1967, ch. 461, §1.

57-39.2-03.1. SEPARATE AND ADDITIONAL TAX ON RETAIL SALES.--There is hereby imposed effective January 1, 1970, a tax of one percent, which tax shall be separate and in addition to any other taxes provided for by law, upon the gross receipts of retailers from all sales at retail including the leasing or renting of tangible personal property as hereinafter provided in this section within the state of North Dakota of the following to consumers or users:

1. Tangible personal property, consisting of goods, wares, or merchandise.
2. The furnishing or service of steam, gas, electricity, water, or communication services.
3. Tickets or admissions to places of amusement or entertainment or athletic events, including amounts charged for participating in an amusement, entertainment, or athletic activity, and including the playing of any machine for amusement or entertainment in response to the use of a coin.
4. Magazines and other periodicals, including subscriptions thereto.
5. The leasing or renting of hotel, motel, or tourist court accommodations for periods of less than thirty consecutive calendar days or one month.
6. The leasing or renting of tangible personal property the transfer of title to which has not been subjected to a retail

sales tax under this chapter or a use tax under the provisions of chapter 57-40.2.

In the case of any contract awarded for the construction of highways, roads, streets, bridges, and buildings prior to January 1, 1970, the contractor receiving the award shall be liable only for the sales tax at the rate of tax in effect on the date of contract.

All definitions of terms, provisions for collection and delinquency, exemptions, assessments, penalties, refunds, notices and appeals, and all other provisions contained and provided for in this chapter, and any other provisions of law now in effect or which may become effective relating to the retail sales tax, shall apply and are hereby made applicable to the tax imposed under the provisions of this section.
SOURCE: S.L. 1969, ch. 528, §11.

57-39.2-03.2. SALES TAX ON ALCOHOLIC BEVERAGES, TOBACCO PRODUCTS, AND OLEOMARGARINE.--Notwithstanding any other provisions of law, the sales tax imposed by this chapter shall apply to the gross receipts of retailers from all sales at retail beginning July 1, 1969, of alcoholic beverages as defined in section 5-01-01, whether mixed or unmixed at the time of sale or thereafter, and whether sold for consumption on the premises or through off-sale outlets for consumption off the premises, and cigarettes, cigars, other tobacco products, and oleomargarine, provided that gross receipts from the sale thereof shall mean and include any other taxes imposed on such merchandise

or its use or on the retail or other sale thereof.
SOURCE: S.L. 1969, ch. 528, §12.

57-39.2-03.3. SALES TAX ON SALES THROUGH VENDING MACHINES.--Beginning July 1, 1969, gross receipts from the sale of tangible personal property costing sixteen cents or more sold through a coin-operated vending machine shall be subject to the sales tax imposed by chapter 57-39.2 and gross receipts from the sale of tangible personal property costing fifteen cents or less sold through a coin-operated vending machine shall be specifically exempted from the provisions of this chapter.
SOURCE: S.L. 1969, ch. 528, §17.

57-39.2-04. EXEMPTIONS.--There are specifically exempted from the provisions of this chapter and from computation of the amount of tax imposed by it the following:

1. Gross receipts from sales of tangible personal property which this state is prohibited from taxing under the constitution or laws of the United States or under the constitution of this state.
2. Gross receipts from the sales, furnishing or service of transportation service.
3. Repealed by S.L. 1971, ch. 567, §1.
4. Gross receipts from sales of tickets, or admissions to state, county, district, and local fairs, and the gross receipts from educational, religious, or

charitable purposes and the gross receipts derived by any public school district if such receipts are expended in accordance with section 15-29-13.
5. Gross receipts from sales of textbooks to regularly enrolled students of a private or public school and from sales of textbooks, yearbooks, and school supplies purchased by a private nonprofit elementary and secondary school conducting courses of study similar to those conducted by public schools in this state.
6. Gross receipts from all sales otherwise taxable under this chapter made to the United States or any state thereof, including the state of North Dakota, or any of the subdivisions, departments, agencies, or institutions thereof.
7. Gross receipts from the sale, by any drugstore, of drugs sold under a doctor's prescription.
8. Gross receipts from sales of commercial fertilizers, fungicides, seed treatments, inoculants and fumigants, herbicides and insecticides to agricultural or commercial vegetable producers and commercial applicators; chemicals used to preserve agricultural crops being stored; and seeds, roots, bulbs, and small plants to commercial users or consumers for planting or transplanting for commercial vegetable gardens or agri-

cultural purposes.

9. Gross receipts from sales of oxygen sold to any person who purchases it upon the written order of a doctor for his own use for medical purposes.
10. Gross receipts from the sale of gasoline, cigarettes, snuff, insurance premiums, or any other article or product upon which the state of North Dakota imposes a special tax.
11. Gross receipts from the sale of feed which is fed to poultry or livestock, including breeding stock and wool-bearing stock, for the purpose of producing eggs, milk, meat, fibers or other products for human consumption and the gross receipts from the sale of feed purchased for the purpose of being fed to draft or fur-bearing animals. The word "feed" as used herein shall be construed to mean and include only salt, grains, hays, tankage, oyster shells, mineral supplements, limestone, molasses, beet pulp, meat and bone scraps, meal, drugs to be used as a part of a feed ration, and other generally recognized animal feeds. The term "feed" does not include drugs not used as part of a feed ration, medicants, wormers, tonics, and like items.
12. Gross receipts from all sales otherwise taxable under this chapter when made to persons who are residents of adjoining states which do not impose or

levy a retail sales tax or are residents of Canada; provided that such persons are in the state of North Dakota for the express purpose of making such purchases, and not as tourists; and provided further that any such person furnish to the North Dakota retailer a certificate signed by him in such form as the tax commissioner may prescribe reciting sufficient facts establishing the exempt status of the sale. Unless such certificate is furnished it shall be presumed, until the contrary is shown, that such person was not in the state of North Dakota for the express purpose of making such purchases; provided further that this exemption shall not apply to any sale to any person who is a resident of another state if the sales price is ten dollars or less or to any person who is a resident of Canada if the sales price is five hundred dollars or less. The deduction for this exemption shall not exceed one and one-half of the amount of the deduction for exempt sales in interstate or foreign commerce which the retailer was legally entitled to deduct on his sales tax returns for the calendar year 1969. If no deduction was taken for interstate or foreign commerce sales on returns filed for the calendar year 1969 or if no returns were required to be filed for the

calendar year 1969, the deduction for this exemption shall not exceed the average interstate or foreign commerce deduction legally allowed by retailers conducting similar business, as determined by the tax commissioner.

13. Gross receipts from the sale of any motor vehicle taxable under the provisions of the motor vehicle excise tax laws of North Dakota.
14. Repealed by S.L. 1969, ch. 528, §24.
15. Gross receipts from sales in which a contractor furnishes to the retailer a certificate which includes the contractor's license number assigned to him under the provisions of chapter 43-07 and the use tax account number assigned to him by the tax commissioner pursuant to section 43-07 -04. Such certificate shall be in the form prescribed by the tax commissioner and shall be furnished by the contractor to the retailer each calendar year prior to the making of any purchases during such calendar year from the retailer without liability for paying the tax to the retailer. Any contractor furnishing such certificate must report and remit the tax to the state tax commissioner on purchases taxable under this chapter made by him in the same manner as retailers remit such tax

under this chapter.

16. Gross receipts from the sale of newsprint and ink used in the publication of a newspaper.
17. Gross receipts from the sale of all services furnished by any hospital, infirmary, sanatorium, nursing home, home for the aged or similar institution to any patient or occupant.
18. Gross receipts from the sale of mixed drinks which are composed of alcoholic beverages and non-alcoholic beverages, or ingredients such as sugar, ice, flavoring syrups, soda-water, pop, malt, and other commodities of a like nature, or any combination thereof when mixed with an alcoholic beverage.
19. Repealed by S.L. 1971, ch. 555, §3.
20. Gross receipts from the sale of food supplies to any public school, to any parochial or private nonprofit school conducting courses of study similar to those conducted by public schools in this state, or to any nonprofit organization, for use by the public, parochial, or private school or nonprofit organization in sponsoring or conducting a lunch program or programs in and for any such public, parochial, or private

nonprofit school.

21. Gross receipts from the leasing or renting of motion picture film to motion picture exhibitors for exhibition if the sale of tickets or admissions to the exhibition of the film is subject to the sales tax imposed by this chapter.
22. Gross receipts from the leasing, or renting, for residential housing for periods of more than thirty consecutive days, of factory manufactured homes, including mobile homes, modular living units, or sectional homes, whether or not placed on a permanent foundation.
23. Food purchased by a student under a boarding contract with a college, university, fraternity, or sorority.

SOURE: S.L. 1967, Ch. 459, §4; 1967, ch. 460, §2; 1969, ch. 472, §3; 1969, ch. 520, §1; 1969, ch. 521, §1; 1969, ch. 522, §1; 1969, ch. 523, §1; 1969, ch. 528, §24; 1971, ch. 176, §2; 1971, ch. 555, §3; 1971, ch. 567, §1; 1971, ch. 568, §1; 1971, ch. 568, §1; 1971, ch. 569, §1; 1971, ch. 570, §1; 1971, ch. 571, §1; 1971, ch. 572, §1.

57-39.2-04.1. SALES TAX EXEMPTION FOR CERTAIN FOOD PRODUCTS.--Beginning January 1, 1970, gross receipts from sales for human consumption of milk and milk products and of fresh and cured meat, including poultry and fish and other fresh and salt water animal products when purchased by consumers for consumption off the premises where purchased, shall be exempt from the sales tax imposed by chapter 57-39.2, except that fresh and cured meat, fish and other fresh and salt water animal products shall not include such products if preserved by enclosure in an airtight container.

SOURE: S.L. 1969, ch. 528, §18.

57-39.2-05. CREDIT OR REFUND FOR TAXES PAID ON WORTHLESS ACCOUNTS AND REPOSSESSIONS.--1. Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off for income tax purposes may be credited upon subsequent payment of the tax herein provided; provided, that if such accounts are hereafter collected by the retailer, a tax shall be paid upon the amount so collected.

2. If a retailer has remitted the sales tax due on the full amount of an installment sales contract rather than on only the installment payments received as provided in subsection 6 of section 57-39.2-01, he may deduct as a credit against his sales tax liability on the next return that he is required to file the amount of sales tax he paid on the installment contract payments which were not made by the purchaser of the merchandise sold under such contract;

such credit may be deducted by the retailer regardless of whether or not said retailer has assigned the contract, provided, however, that if the retailer has assigned the contract he must have assigned it subject to an agreement to repurchase the contract in the event of default by the purchaser under the contract or subject to a guarantee that the payments under the contract would be made. In the event such deduction exceeds the amount of sales tax due the state by the retailer in the next regular return, such excess shall be allowed as a credit against future sales tax due from the retailer. If in any case the credit, or any part of it, cannot be utilized by the retailer because of a discontinuance of a business or for other valid reasons, the amount thereof may be refunded to the retailer.
SOURCE: S.L. 1967, ch. 459, §5.

57-39.2-06. CREDIT TO RELIEF AGENCY AND LOCAL GOVERNMENTAL UNITS.--A relief agency may apply to the commissioner for refund of the amount of tax imposed under this chapter and paid upon sales to it of any goods, wares, or merchandise used for free distribution to the poor and needy. Such refunds may be obtained only in the following amount and in the manner and only under all of the following conditions:

1. On forms furnished by the commissioner, and during the time herein provided for the filing of quarterly tax returns by retailers, the relief agency

shall report to the commissioner the total amount or amounts, valued in money, expended directly or indirectly for goods, wares, or merchandise used for free distribution to the poor and needy.
2. On these forms the relief agency shall separately list the persons making the sales to it or to its order, together with the dates of the sales, and the total amount so expended by the relief agency.
3. The relief agency must prove to the satisfaction of the commissioner that the person making the sales has included the amount thereof in the computation of the gross receipts of such person and that such person has paid the tax levied by this chapter, based upon such computation of gross receipts.

If the commissioner is satisfied that the foregoing conditions and requirements have been complied with, he shall refund the amount claimed by the relief agency.
SOURCE: S.L. 1967, ch. 459, §6.

57-39.2-07. SALES TAX TO BE ADDED TO PURCHASE PRICE AND BE A DEBT.--Retailers shall add the tax imposed under section 57-39.2-02, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from the consumer or user to the retailer until paid, and shall be recoverable at law in the same manner as

other debts.

In adding such tax to the price or charge, retailers shall adopt the following bracket system for the application of the tax:

$0.01	to $0.19.....	no tax
.20	to .59.....	1 ¢ tax
.60	to .99.....	2 ¢ tax
1.00	to 1.49.....	3 ¢ tax
1.50	to 1.99.....	4 ¢ tax
2.00	to 2.49.....	5 ¢ tax
2.50	to 2.99.....	6 ¢ tax
3.00	to 3.49.....	7 ¢ tax
3.50	to 3.99.....	8 ¢ tax

An additional tax of 1¢ for each 50¢, or fraction thereof, over $3.99 except that for each full $4.00 there shall be collected a tax of 9¢.
SOURCE: S.L. 1967,ch. 459, §7.

57-39.2-08. SEPARATE AND ADDITIONAL TAX ON RETAIL SALES TO BE ADDED TO PURCHASE PRICE AND BE A DEBT.--Retailers shall add the tax imposed under section 57-39.2-03, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from the consumer or user to the retailer until paid, and shall be recoverable at law in the same manner as other debts.

In adding such tax to the price or charge, and when such tax is applied and collected at the same time, in the same manner and in addition to but as a part of the sales tax imposed by section

57-39.2-02, retailers shall adopt the following bracket system for the application of the tax, which system shall supersede the bracket system provided for in section 57-39.2-02:

$0.01	to $0.14.....	no tax
.15	to .33.....	1¢ tax
.34	to .67.....	2¢ tax
.68	to 1.00.....	3¢ tax

Each additional $1.00....3¢ additional tax or each additional 33¢ or fraction thereof over $1.00....1¢ additional tax.
SOURCE: S.L. 1967, ch. 461, §2.

57-39.2-08.1. SEPARATE AND ADDITIONAL TAX ON RETAIL SALES TO BE ADDED TO PURCHASE PRICE AND BE A DEBT.--Retailers shall add the tax imposed under section 57-39.2-03.1, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from the consumer or user to the retailer until paid, and shall be recoverable at law in the same manner as other debts.

In adding such tax to the price or charge, and when such tax is applied and collected at the same time, in the same manner and in addition to but as a part of the sales taxes imposed by sections 57-39.2-02 and 57-39.2-03, retailers shall adopt the following bracket system for the application of the tax, which system shall supersede the bracket systems provided for in sections 57-39.2-07 and 57-39.2-08:

$0.01 to	$0.15.....	no tax
.16 to	.31.....	1¢ tax
.32 to	.51.....	2¢ tax
.52 to	.71.....	3¢ tax
.72 to	1.00.....	4¢ tax

Each additional $1.00....4¢ additional tax or each additional 25¢ or fraction thereof over $1.00....1¢ additional tax.
SOURCE: S.L. 1969, ch. 528, §13.

57-39.2-09. UNLAWFUL ACT.--No retailer shall advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this chapter shall be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer or, if added, that it or any part thereof will be refunded.
SOURCE: S.L. 1967, ch. 459, §8.

57-39.2-10. RECORDS REQUIRED - SALES FOR RESALE EXEMPT.--1. Every retailer required to make a report and pay any tax under this chapter, shall preserve such records of the gross proceeds of sale as the commissioner may require and every retailer shall preserve for a period of three years all invoices and other records of goods, wares, or merchandise purchased for resale. All such books, invoices, and other records shall be open to examination at any time by the commissioner or any of his duly authorized agents.

2. Whenever a retailer accepts in good faith a resale certificate at the time of making a sale, which sale would otherwise be subject to the sales tax, and such resale certificate contains the sales tax permit number of the purchaser, such retailer making the sale shall be relieved from submitting the sales tax upon the purchase price of the merchandise sold. Whenever a person submits a false resale certificate to a retailer the person submitting the certificate shall be personally liable for the tax on the sale.
SOURCE: S.L. 1967, ch. 459, §9; 1967, ch. 460, §3; 1971, ch. 573, §1.

57-39.2-11. RETURN OF GROSS RECEIPTS.--1. On or before the last day of the month following the close of the first quarterly period as defined in the following section, and on or before the last day of the month following each subsequent quarterly period of three months, the retailer shall make out a return for the preceding quarterly period in such form and manner as may be prescriged by the commissioner, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the commissioner may require to enable him correctly to compute and collect the tax herein levied. The commissioner upon request by any retailer and a proper showing of the necessity therefor, may grant unto such retailer an extension of time not to exceed thirty days for making such return. If such extension is granted to any such

retailer, the time in which he is required to make payment as provided for in section 57-39.2-12 shall be extended for the same period;

2. The commissioner, if he deems it necessary or advisable in order to ensure the payment of the tax imposed by this chapter, or if he deems it practical, may require returns and payment of the tax to be made for annual periods or other than quarterly periods, the provisions of this chapter to the contrary notwithstanding; and

3. Returns shall be signed by the retailer or his duly authorized agent and shall contain a written declaration that they are made and subscribed under the penalties of this chapter.

SOURCE: S.L. 1967, ch. 459, §10; 1969, ch. 524, §1.

57-39.2-12. PAYMENT OF TAX, BOND, CREATION OF LIEN.--1. The tax levied under this chapter shall be due and payable in quarterly installments on or before the last day of the month next succeeding each calendar quarterly period, except that when there is a sale of any business by any retailer or when any business is discontinued by a retailer, the tax shall become due immediately prior to the sale or discontinuance of such business and if not paid within fifteen days thereafter it shall become delinquent subject to the penalties provided in section 57-39.2-18.

2. Every retailer, at the time of making the returnrequired herein, shall compute and pay to the commissioner the tax due for the preceding period.

3. The commissioner, when in his judgment it is necessary and advisable to do so in order to secure the collection of the tax levied under this chapter, may require any person subject to such tax to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the insurance commissioner as to solvency and responsibility in such amount as the commissioner may fix, to secure the payment of any tax and penalties due or which may become due from such person. In lieu of such bond, securities approved by the commissioner in such amounts as he may prescribe, may be deposited with him, which securities shall be kept in the custody of the commissioner and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax and penalties due. All moneys deposited as security with the state tax commissioner under the provisions of this subsection shall be paid by the state tax commissioner to the state treasurer and shall be credited by the state treasurer into a special fund to be known as the "Retail Sales and Use Tax Security Trust Fund". If any tax, penalty or costs imposed by this chapter are not paid when due, by the person depositing moneys with the state tax commissioner as security for the payment of tax, penalty or costs imposed by this

chapter, the state tax commissioner shall certify that information to the director of accounts and purchases who shall transmit the money to the tax commissioner who shall apply the money deposited by the person or so much thereof as is necessary to satisfy the tax and penalties due. The state tax commissioner, when in his judgment it is no longer necessary to require the deposit to be maintained by the person, shall certify that information to the director of accounts and purchases who shall pay the unused money to the person entitled thereto.

4. Remittances on account of tax due under this chapter shall not be deemed or considered payment thereof unless or until the commissioner shall have collected or received the amount due for such tax in cash or equivalent credit.

SOURCE: S.L. 1967, ch. 459, §11.

57-39.2-13. LIEN OF TAX - COLLECTION - ACTION AUTHORIZED.--1. Whenever any taxpayer liable to pay a tax or penalty imposed refuses or neglects to pay the same, the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the state of North Dakota upon all property and rights to property, whether real or personal, belonging to said taxpayer, and in the case of property in which a deceased taxpayer held an interest as joint tenant or otherwise with right of survivorship at the time of his death, the lien shall continue as a lien against the

property in the hands of the survivor or survivors to the extent of the deceased taxpayer's interest therein, which interest shall be determined by dividing the value of the entire property at the time of the taxpayer's death by the number of joint tenants or persons interested therein.

2. The lien aforesaid shall attach at the time the tax becomes due and payable and shall continue until the liability for such amount is satisfied; for the purposes of this provision the words "due" and "due and payable" shall mean the first instant at which the tax becomes due.

3. In order to preserve the aforesaid lien against subsequent mortgagees, purchasers, or judgment creditors, for value and without notice of the lien, on any property situated in a county, the tax commissioner shall file with the register of deeds of the county in which said property is located, a notice of said lien.

4. The register of deeds of each county shall prepare and keep in his office a book known as "Index of Tax Liens", so ruled as to show in appropriate columns all of the following data, under the names of taxpayers, arranged alphabetically:

a. The name of the taxpayer.
b. The name "State of North Dakota" as claimant.
c. Time notice of lien was received.
d. Date of notice.
e. Amount of lien when due.
f. When satisfied.

The register of deeds shall endorse on each notice of lien the day, hour, and minute when received and preserve the same, and forthwith shall index said notice in said index book and forthwith shall record said lien in the manner provided for recording real estate mortgages, and the said lien shall be effective from the time of the indexing thereof.

5. The tax commissioner shall be exempt from the payment of the recording and filing fees as otherwise provided by law for the recording and filing of such lien, or for the satisfaction thereof.

6. Upon the payment of a tax as to which the tax commissioner has filed notice with the register of deeds, the tax commissioner forthwith shall file with said register of deeds a satisfaction of said tax and the register of deeds shall enter said satisfaction on the notice on file in his office and indicate said fact on the index aforesaid.

7. The attorney general, upon the request of the tax commissioner, shall bring an action at law or in equity, as the facts may justify, without bond to

enforce payment of any taxes and any penalties, or to foreclose the lien therefor in the manner provided for mortgages on real or personal property, and in such action he shall have the assistance of the state's attorney of the county in which the action is pending.

8, It is expressly provided that the foregoing remedies of the state shall be cumulative and that no action taken by the tax commissioner or attorney general shall be construed to be an election on the part of the state or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy provided by law.

9. The technical, legal requirements outlined in this section relating to tax liens on all real and personal property of the taxpayer to ensure payment of the taxes, including penalties, interest and other costs, are self-explanatory.
SOURCE: S.L. 1967, ch. 459, §12.

57-39.2-14. PERMITS - APPLICATION FEE FOR REISSUANCE.--1. No person shall engage in or transact business as a retailer within this state unless a permit or permits shall have been issued to him as hereinafter prescribed. Every person desiring to engage in or conduct business as a retailer within this state shall file with the commissioner an application for a permit or permits. Every application for such a permit shall be made upon a form prescribed by the commissioner and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places

of business, and such other information as the commissioner may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner thereof; in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

2. Upon determining that each applicant for a sales tax permit is a bona fide retailer the commissioner shall grant and issue to each applicant a permit for each place of business within the state. A permit is not assignable and shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. It shall at all times be conspicuouly displayed at the place for which issued. Any transient merchant who is in the business of soliciting or making sales at retail to consumers shall, before soliciting such a sale from a consumer, exhibit to the consumer or prospective consumer the retail sales tax permit required by this section; for the purposes of this sentence the term "transient merchant" shall include any person, individual, copartnership, or corporation, either as principal or agent, who solicits, engages in, does, or transacts any temporary or transient business in this state, either in one locality, or in traveling from place to place in this state, selling goods, wares, and merchandise, who does not intend to become and does not become a permanent merchant of such place,and who, for the purpose of carrying on such business,

hires, leases, occupies, or uses, a building, structure, lot, tract, railroad car, motor vehicle, or display case or sample case of any kind for the exhibition and sale of such goods, wares, and merchandise.

3. Permits issued under the provisions of this section shall be valid and effective until revoked by the commissioner.

4. Whenever the holder of a permit fails to comply with any of the provisions of this chapter or any rules or regulations prescribed by the commissioner and adopted under this chapter, or whenever the holder of a permit shall file returns showing no tax due for four consecutive quarters, the commissioner upon hearing after giving ten days' notice of the time and place of the hearing to show cause why his permit should not be revoked, may revoke the permit. The commissioner also shall have the power to restore licenses after such revocation.

5. The commissioner shall charge a fee of five dollars for the issuance of a permit to a retailer whose permit has been previously revoked.

6. All permits in effect at the time this chapter takes effect are hereby continued and shall remain in full force and effect unless revoked as herein provided; provided that the commissioner may issue a new form of permit to

replace, at no charge to the permit holders, all permits previously granted and issued that have not been revoked or surrendered.
SOURCE: S.L. 1967, ch. 459, §13.

57-39.2-15. FAILURE TO FILE RETURN - INCORRECT RETURN.--If a return required by this chapter is not filed, or if a return when filed is incorrect or insufficient the commissioner shall determine the amount of tax due from such information as he may be able to obtain, and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and other factors. The commissioner shall give notice of such determination to the person liable for the tax. Such determination shall fix the tax finally and irrevocably unless the person against whom it is assessed, within fifteen days after the giving of notice of such determination, shall apply to the commissioner pursuant to chapter 28-32 for a hearing or unless the commissioner of his own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the commissioner shall give notice of his decision to the person liable for the tax pursuant to the provisions of chapter 28-32.
SOURCE: S.L. 1967, ch. 459, §14; 1969, ch. 525, §1.

57-39.2-16. APPEALS.--1. An appeal may be taken by the taxpayer to the district court of the county in which he resides, or in which his principal place of business is located, within thirty days after he shall have received notice from the commissioner of his determination as provided for in section 57-39.2-15. The appeal shall be taken pursuant to and in accordance with chapter 28-32.

2 and 3. Repealed by S.L. 1969, ch. 525, §3.
SOURCE: S.L. 1967, ch. 459, §15; 1969, ch. 525, §§2,3.

57-39.2-17. SERVICE OF NOTICE.--1. Any notice, except notice of appeals, authorized or required under the provisions of this chapter may be given by mailing the same to the person for whom it is intended by registered or certified mail addressed to such person at the address given in the last return filed by him pursuant to the provisions of this chapter, or if no return has been filed, then such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this chapter by giving of notice shall commence to run from the date of registration and posting of such notice.

2. If any tax imposed by this chapter remains unpaid, a proceeding in court for the collection of such tax may be begun at any time within three years

after the due date of such tax or at any time within three years after the date the tax liability became finally and irrevocably fixed pursuant to section 57-39.2-15, whichever occurs later in point of time; provided that no limitation of time to collect such tax shall apply if the failure to pay such tax was due to the fraudulent intent or willful attempt of the taxpayer in any manner to evade the tax. The limitations provided by this chapter in regard to a commencement of court proceedings shall not apply to any assessment of tax made by the tax commissioner prior to July 1, 1971.
SOURCE: S.L. 1967, ch. 459, §16; 1971, ch. 573, §2.

57-39.2-18. PENALTIES, OFFENSES.--
1. Any person failing to file a return or corrected return or to pay any tax within the time required by this chapter shall be subject to a penalty of five percent of the amount of tax due or of five dollars, whichever is greater, plus one percent of such tax for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax became due. The commissioner, if satisfied that the delay was excusable, may waive, and if paid, refund all or any part of such penalty. Such penalty shall be paid to the commissioner and disposed of in the same manner as other receipts under this chapter. Unpaid penalties may be enforced in the same manner as the tax imposed by this chapter.

2. Any person who shall sell tangible personal property, tickets or admissions to places of amusement, and

athletic events, or steam, gas, water, electricity, and communication service at retail in this state after his permit shall have been revoked, or without procuring a permit within sixty days after the effective date of this chapter, as provided in section 57-39.2-14, or who shall violate the provisions of section 57-39.2-09, and the officers of any corporation who shall so act, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment, in the discretion of the court.

3. Any person required to make, render, sign or verify any return or supplementary return, who makes any false or fraudulent return with intent to defeat or evade the assessment required by law to be made, shall be guilty of a misdemeanor and, for each such offense, shall be fined not to exceed five hundred dollars or shall be imprisoned in the county jail not exceeding one year, or shall be subject to both a fine and imprisonment, in the discretion of the court.

4. The certificate of the commissioner to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this chapter, shall be prima facie evidence thereof.

5. Any person failing to comply with any of the provisions of this chapter, or failing to remit within the time herein provided to the state the tax due on any sale or purchase of tangible personal property subject to said sales tax, shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by a fine of not exceeding five hundred dollars, or by both such fine and imprisonment, in the discretion of the court. This criminal liability shall be cumulative and in addition to the civil liability for penalties hereinbefore provided.
SOURCE: S.L. 1967, ch. 459, §17; 1969, ch. 526, §1; 1971, ch. 536, §4.

57-39.2-19. TAX COMMISSIONER TO ADMINISTER CHAPTER.--The tax commissioner is hereby charged with the administration of this chapter and the taxes imposed thereby. Such commissioner may prescribe all rules and regulations not inconsistent with the provisions of this chapter, necessary and advisable for its detailed administration and to effectuate the purposes, including the right to provide for the issuance and sale by the state of coupons covering the amount of tax or taxes to be paid under this chapter, if such method is deemed advisable by said commissioner.
SOURCE: S.L. 1967, ch. 459, §18.

57-39.2-20. TAX, PENALTIES AND OTHER CHARGES PAID TO COMMISSIONER - DISPOSITION.--All fees, taxes, penalties and other charges imposed and collected under this chapter shall be paid to the commissioner in the form of a remittance payable to the commissioner who shall transmit each payment monthly to the state treasurer to be deposited in the state treasury to the credit of the general fund.
SOURCE: S.L. 1967, ch. 459, §19.

57-39.2-21. GENERAL POWERS.--1. The commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of the taxable income and receipts of any taxpayer, shall have power to examine or cause to be examined by any agent or representative designated by him, books, papers, records, or memoranda; to require by subpoena the attendance and testimony of witnesses; to issue and sign subpoenas; to administer oaths; to examine witnesses and receive evidence; to compel witnesses to produce for examination books, papers, records, and documents relating to any matter which he shall have the authority to investigate or determine.

2. Where the commissioner finds the taxpayer has made a fraudulent return, the costs of said hearing shall be taxed to the taxpayer. In all other cases the cost shall be paid by the state.

3. The fees and mileage to be paid witnesses and taxed as costs shall be the same as prescribed by law in

proceedings in the district court of this state in civil cases. All costs shall be taxed in the manner provided by law in proceedings in civil cases. Where the costs are taxed to the taxpayer, they shall be added to the taxes assessed against said taxpayer and shall be collected in the same manner. Costs taxed to the state shall be certified by the commissioner to the state treasurer, who shall issue warrants for the amount of said costs.

4. In cases of disobedience to a subpoena the commissioner may invoke the aid of any court of competent jurisdiction in requiring the attendance and testimony of witnesses and production of records, books, papers, and documents, and such court may issue an order requiring the person to appear before the commissioner and give evidence or produce records, books, papers, and documents, as the case may be, and any failure to obey such order of court may be punished by the court as contempt thereof.

5. Testimony on hearings before the commissioner may be taken by a deposition as in civil cases, and any person may be compelled to appear and depose in the same manner as witnesses may be compelled to appear and testify as hereinbefore provided.
SOURCE: S.L. 1967, ch. 459, §20.

57-39.2-22. COMMISSIONER MAY APPOINT AGENTS AND EMPLOYEES - COMPENSATION - BOND.--1. The commissioner may appoint such agents, auditors, clerks, and employees as he may deem necessary, fix their salaries and compensation and prescribe their duties and powers, and may remove such persons so appointed by him. Each auditor appointed by the commissioner shall have had at least three years' experience, or the education equivalent thereof, in the auditing and checking of books of account.

2. All such agents and employees shall be allowed such reasonable and other necessary traveling expenses as may be incurred in the performance of their duties not to exceed, however, such amounts as are now or may hereafter be fixed by law.

3. The commissioner may require such of the officers, agents, and employees as he may designate to give bond for the faithful performance of the duties in such sum and such sureties as he may determine and the state shall pay the premiums on such bonds.

4. The commissioner may utilize the office of the treasurer of the various counties in order to administer this chapter and effectuate its purposes and may appoint the treasurersof the various counties his agents to collect any or all of the taxes imposed by this chapter. No additional compensation shall be paid to said treasurer by reason thereof.
SOURCE: S.L. 1967, ch. 459, §21.

57-39.2-23. INFORMATION DEEMED CONFIDENTIAL - PENALTY.--It shall be unlawful for the commissioner, or any person having an administrative duty under this chapter, to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or sources of income, profits, losses, expenditures or any particulars thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract of particulars thereof to be seen or examined by any person except as provided by law. The commissioner may authorize examination of such returns by other state officers, or, if a reciprocal arrangement exists, by tax officers of another state, or the federal government. Any person violating the provisions of this section shall be guilty of a misdemeanor and punishable by a fine of not to exceed one thousand dollars.

The commissioner is hereby authorized to furnish to the workmen's compensation bureau or to the unemployment compensation division of the employment security bureau upon request of either a list or lists of holders of permits issued pursuant to the provisions of this chapter or chapter 57-40.2, together with the addresses and tax department file identification numbers of such permit holders, provided that any such list shall be used by the bureau to which it is furnished only for the purpose of

administering the duties of such bureau. The commissioner, or any person having an administrative duty under this chapter, is hereby authorized to announce that a permit has been revoked.
SOURCE: S.L. 1967, ch. 459, §22; 1969, ch. 516, §3; 1971, ch. 536, §5.

57-39.2-24. CORRECTION OF ERRORS.--If it shall appear that, as a result of a mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this chapter, then such amount shall be credited against any tax due, or to become due, under this chapter from the person who made the erroneous payment, or such amount shall be refunded to such person by the commissioner.
SOURCE: S.L. 1967, ch. 459, §23.

57-39.2-25. PAYMENT OF REFUND.--Whenever by any provisions of this chapter a refund is authorized, the commissioner shall certify the amount of the refund, the reason therefor and the name of the payee to the department of accounts and purchases, who shall thereupon draw a warrant on the general fund in the amount specified payable to the named payee.
SOURCE: S.L. 1967, ch. 459, §24.

57-39.2-26. ALLOCATION OF REVENUE.--All moneys collected and received under this chapter shall be paid into the state treasury and shall be credited by the state treasurer to the general fund. Moneys deposited with the tax commissioner as security for the payment of tax, penalties or costs due shall be

deposited and accounted for as provided in subsection 3 of section 57-39.2-12.
SOURCE: S.L. 1967, ch. 459, §25.

57-39.2-27. DISPOSITION OF EXCESS TAX COLLECTIONS.--Whenever a retailer has collected a sales tax from a customer in excess of the amount prescribed or due under this chapter, and if the retailer does not refund the excessive tax collected to the customer, the amount so collected by the retailer shall be paid by the retailer to the tax commissioner in the quarterly period in which the excessive collection occurred. If the excessive collection is subsequently refunded by the retailer to the customer, the retailer may deduct, as a credit against his sales tax liability on the next return that he is required to file, the amount of sales tax properly refunded to the customer. In the event such deduction exceeds the amount of sales tax due the state by the retailer in the next regular return, such excess shall be allowed as a credit against future sales tax due from the retailer. If the credit, or any part of it, cannot be utilized by the retailer because of a discontinuance of a business or for other valid reasons, the amount thereof may be refunded to the retailer.
SOURCE: S.L. 1969, ch. 527, §1.

REPLACEMENT VOLUME 11

1975 POCKET SUPPLEMENT

CHAPTER 57-39.2 - SALES TAX

CHAPTER 57-39.2

SALES TAX

SECTION

57-39.2-01	Definitions.
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57-39.2-01. DEFINITIONS.--The following words, terms, and phrases, when used in this chapter, have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

1 and 2. * * * [Same as parent volume.]

3. "Retail sale" or "sale at retail" means the sale, including the leasing or renting, to a consumer or to any person for any purpose, other than for processing or for resale, of tangible personal property; the sale of steam, gas, electricity, water, and communication service to retail consumers or users; the ordering, selecting, or aiding a customer to select any goods, wares, or merchandise from any price list or catalog, which the customer might order, or be ordered for such customer to be shipped directly to such customer; the sale or furnishing of hotel, motel, or tourist court accommodations, tickets, or admissions to any place of amusement, athletic event, or place of entertainment including the playing of any machine for amusement or entertainment in response to the use of a coin; and the sales of magazines and other periodicals. By the term "processing" is meant any tangible personal property including containers which it is intended, by means of fabrication, compounding, manufacturing, producing, or germination shall become an integral or an ingredient or component part of other tangible personal property intended to be sold ultimately at retail. The

sale of an item of tangible personal property for the purpose of incorporating it in or attaching it to real property shall be considered as a sale of tangible personal property for a purpose other than for processing; the delivery of possession within the state of North Dakota of tangible personal property by a wholesaler or distributor to an out-of-state retailer who does not hold a North Dakota retail sales tax permit or to a person who by contract incorporates such tangible personal property into, or attaches it to, real property situated outside of North Dakota shall not be considered a taxable sale. As used in this subsection the word "consumer" shall include any hospital, infirmary, sanatorium, nursing home, home for the aged, or similar institution that furnishes services to any patient or occupant.

4. * * * [Same as parent volume.]

5. "Retailer" includes every person engaged in the business of leasing or renting hotel, motel, or tourist court accommodations, and every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or furnishing of steam, gas, electricity, water and communication services, or tickets or admissions to places of amusement, entertainment and athletic events including the

playing of any machine for amusement or entertainment in response to the use of a coin, or magazines, or other periodicals; and shall include any person as herein defined who by contract or otherwise agrees to furnish for a consideration a totally or partially finished product containing in whole or in part of tangible personal property subject to the sales tax herein provided, and all items of tangible personal property entering into the performance of such contract as a component part of the product agreed to be furnished under said contract shall be subject to the sales tax herein provided and the sales tax thereon shall be collected by the contractor from the person for whom the contract has been performed in addition to the contract price agreed upon, and shall be remitted to the state in manner provided in this chapter; and shall include the state or any municipality furnishing steam, gas, electricity, water, or communication service to members of the public in its proprietary capacity. For the purpose of this chapter retailer shall also include every clerk, auctioneer, agent or factor selling tangible personal property owned by any other retailer.

6. "Gross receipts" means the total amount of sales of retailers,

valued in money, whether received in money or otherwise, provided, however, that discounts for any purposes allowed and taken on sales shall not be included, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. Provided, further, however, that when tangible personal property is taken in trade or in a series of trades as a credit or part payment of a retail sale taxable under this chapter, if the tangible personal property traded in will be subject to the sales tax imposed by this chapter when sold or will be subject to the motor vehicle excise tax imposed by chapter 57-40.3, the credit or trade-in value allowed by the retailer shall not be regarded as gross receipts. Provided, further, however, that on all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof that only such portion of the sale amount thereof shall be accounted for, for the purpose of imposition of tax imposed by this chapter,

as has actually been received in cash by the retailer during each quarterly period as defined herein. "Gross receipts" shall also mean, with respect to the leasing or renting of tangible personal property, the amount of consideration, valued in money, whether received in money or otherwise, received from the leasing or renting of only such tangible personal property the transfer of title to which has not been subjected to a retail sales tax in this state. "Gross receipts" shall also mean, with respect to subscriptions to magazines and other periodicals, the amount of consideration, valued in money, whether received in money or otherwise, received from the sale of such subscriptions regardless of whether or not such magazines or periodicals are to be delivered in the future and regardless of whether or not they are in existence at the time of the sale of any subscription. For the purpose of this chapter gross receipts shall also include the total amount of sales of every clerk, auctioneer, agent or factor selling tangible personal property owned by any other retailer, and shall further include the total amount of sales of every clerk, auctioneer, agent or

factor selling tangible personal property owned by any other person not a retailer if such tangible personal property owned by any other person who is not a retailer is sold at a sale where tangible personal property owned by a retailer is also sold.

7 to 9. * * * [Same as parent volume.]

SOURCE: N.D.C.C.; S.L. 1973, ch. 478, §1; 1975, ch. 545, §1.

57-39.2-03.2. SALES TAX ON ALCOHOLIC BEVERAGES AND TOBACCO PRODUCTS.--Notwithstanding any other provisions of law, the sales taxes imposed by this chapter shall apply to the gross receipts of retailers from all sales at retail beginning July 1, 1973, of alcoholic beverages as defined in section 5-01-01, whether mixed or unmixed at the time of sale or thereafter, and whether sold for consumption on the premises or through off-sale outlets for consumption off the premises, and cigarettes, cigars, and other tobacco products, provided that gross receipts from the sale thereof shall mean and include any other taxes imposed on such merchandise or its use or on the retail or other sale thereof.

SOURCE: N.D.C.C.; S.L. 1973, ch. 465, §3.

57-39.2-04. EXEMPTIONS.--There are specifically exempted from the provisions of this chapter and from computation of the amount of tax imposed by it the following:

1. * * * [Same as parent volume.]
2. Gross receipts from the sales, furnishing, or service of passenger transportation service and gross receipts from the sales, furnishing, or service of freight transportation service when provided by a common carrier.
3. * * * [Same as parent volume.]
4. Gross receipts from sales of tickets, or admissions to state, county, district, and local fairs, and the gross receipts from educational, religious, or charitable activities, where the entire amount of net receipts is expended for educational, religious, or charitable purposes and the gross receipts derived by any public school district if such receipts are expended in accordance with section 15-29-13.
5. Gross receipts from sales of textbooks to regularly enrolled students of a private or public school and from sales of textbooks, yearbooks, and school supplies purchased by a private nonprofit elementary school, secondary school or any other nonprofit institution of higher learning conducting courses of

study similar to those conducted by public schools in this state.

6. Gross receipts from all sales otherwise taxable under this chapter made to the United States or to any state thereof, including the state of North Dakota, or any of the subdivisions, departments, agencies, or institutions thereof. The governmental units exempted by this subsection shall be issued a certificate of exemption by the tax commissioner and such certificate shall be presented to each retailer whenever this exemption is claimed.

7 to 9. * * * [Same as parent volume.]

10. Gross receipts from sale of gasoline, insurance premiums, or any other article or product, except as otherwise provided, upon which the state of North Dakota imposes a special tax.

11. * * * [Same as parent volume.]

12. Gross receipts from all sales otherwise taxable under this chapter when made to persons who are residents of adjoining states which do not impose or levy a retail sales tax or are residents of Canada; provided that such persons are in the state of North Dakota for the express purpose of making such purchases, and not as tourists;

and provided further that any such person furnish to the North Dakota retailer a certificate signed by him in such form as the tax commissioner may prescribe reciting sufficient facts establishing the exempt status of the sale. Unless such certificate is furnished it shall be presumed, until the contrary is shown, that such person was not in the state of North Dakota for the express purpose of making such purchases; provided further that this exemption shall not apply to any sale to any person who is a resident of another state if the sales price is twenty-five dollars or less or to any person who is a resident of Canada if the sales price is twenty-five dollars or less.

13 to 17. * * * [Same as parent volume.]

18. Repealed by S.L. 1973, ch. 480, §6.

19 to 23. * * * [Same as parent volume.]

24. Gross receipts from all sales otherwise taxable under this chapter when made to any skilled nursing facility or intermediate care facility licensed by the state health department.

25. Gross receipts from the sale of Bibles, hymnals, textbooks,

and prayerbooks sold to non-profit religious organizations.

26. Gross receipts from sales of:
    a. Artificial devices individually designed, constructed, or altered solely for the use of a particular crippled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure including the extremities of the individual.
    b. Artificial limbs, artificial eyes, hearing aids, and other equipment worn as a correction or substitute for any functioning portion of the body.
    c. Artificial teeth sold by a dentist.
    d. Eye glasses when especially designed or prescribed by an ophthalmologist, physician, oculist, or optometrist for the personal use of the owner or purchaser.
    e. Crutches and wheelchairs for the use of invalids and crippled persons.

SOURCE: N.D.C.C.; S.L. 1973, ch. 479, §1; 1973, ch. 480, §§1,6; 1973, ch. 481, §1; 1975, ch. 546, §1; 1975, ch. 547, §1; 1975, ch. 548, §1; 1975, ch. 549, §1; 1975, ch. 550, §1; 1975, ch. 551, §1.

57-39.2-04.1. SALES TAX EXEMPTION FOR FOOD AND FOOD PRODUCTS.--Beginning July 1, 1973, gross receipts from sales for human consumption of food and food products including but not limited to cereal and cereal products, butter, cheese, milk and milk products, oleomargarine, meat and meat products, poultry and fish and other fresh and salt-water animal products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products including candy and confectionary products, chewing gum, coffee and coffee substitutes, tea, cocoa and cocoa products, and carbonated beverages when purchased by consumers for consumption off the premises where purchased, shall be exempt from the sales tax imposed by chapter 57-39.2. "Food" and "food products" as used herein shall not include any alcoholic beverages or mixed drinks made therefrom, bottled water, or medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

SOURCE: N.D.C.C., S.L. 1973, ch. 465, §4.

57-39.2-10. RECORDS REQUIRED - SALES FOR RESALE EXEMPT.--

1. Every retailer required to make a report and pay any tax under this chapter shall preserve such records of the gross proceeds of sale as the commissioner may require and every retailer shall preserve for a

period of three years and three months all invoices and other records of goods, wares, or merchandise purchased for resale. All such books, invoices, and other records shall be open to examination at any time by the commissioner or any of his duly authorized agents.

2. Whenever a retailer accepts a resale certificate at the time of making a sale, which sale would otherwise be subject to the sales tax, and such resale certificate contains the sales tax permit number of the purchaser, such retailer making the sale shall be relieved from submitting the sales tax upon the purchase price of the merchandise sold. Whenever a person submits a false resale certificate to a retailer, the person submitting the certificate shall be personally liable for the tax on the sale.

SOURCE: N.D.C.C.; S.L. 1973, ch. 480, §2; 1975, ch. 552, §1.

57-39.2-11. RETURN OF GROSS RECEIPTS. --1. On or before the last day of the month following the close of the first quarterly period as defined in the following section, and on or before the last day of the month following each subsequent quarterly period of three months, the retailer shall make out a return for the preceding quarterly period in such form and manner as may be prescribed by the commissioner, showing the gross receipts of the retailer, the

amount of the tax for the period covered by such return, and such further information as the commissioner may require to enable him correctly to compute and collect the tax herein levied. The commissioner, upon request by any retailer and a proper showing of the necessity therefor, may grant unto such retailer an extension of time not to exceed thirty days for making such return. If such extension is granted to any such retailer, the time in which he is required to make payment as provided for in section 57-39.2-12 shall be extended for the same period but interest shall be charged upon the amount of the deferred payment at the rate of eight percent per annum from the date the tax would have been due if the extension had not been granted to the date the tax is paid;

2 and 3. * * * [Same as parent volume.]

SOURCE: N.D.C.C.; S.L. 1975, ch. 553, §1.

57-39.2-13. LIEN OF TAX - COLLECTION - ACTION AUTHORIZED.--1 to 3. * * * [Same as parent volume.]

4. The register of deeds of each county shall prepare and keep in his office a book known as "Index of Tax Liens", so ruled as to show in appropriate columns all of the following data, under the names of taxpayers, arranged alphabetically:

a. The name of the taxpayer.

b. The name "State of North Dakota" as claimant.
c. Time notice of lien was received.
d. Date of notice.
e. Amount of lien when due.
f. When satisfied.

The register of deeds shall endorse on each notice of lien the day, hour, and minute when received and preserve the same, and forthwith shall index said notice in said index book and the said lien shall be effective from the time of the indexing thereof.

5. The tax commissioner shall be exempt from the payment of the filing fees as otherwise provided by law for the filing of such lien, or for the satisfaction thereof.

6 to 9. * * * [Same as parent volume.]

SOURCE: N.D.C.C.; S.L. 1973, ch. 475, §2.

57-39.2-15. FAILURE TO FILE RETURN - INCORRECT RETURN.--If a return required by this chapter is not filed, or if a return when filed is incorrect or insufficient the commissioner shall determine the amount of tax due from such information as he may be able to obtain, and, if necessary, may estimate the tax on the basis of external indices, such as number of employees of the person concerned, rentals paid by him, his stock on hand, and other factors. The commissioner shall give notice of such determination to the person liable for the tax. If the

determination of tax due relates to an incorrect or insufficient return filed by a taxpayer, notice of such determination shall be given not later than three years after the last day on which the return was due or three years after the return was filed, whichever period expires later; notice of determination of a tax due for any reporting period for which a taxpayer failed to file a return shall be given not later than six years after the due date of the return; where fraudulent information is given in a return or where the failure to file a return is due to the fraudulent intent or willful attempt of the taxpayer in any manner to evade the tax, the time limitation herein provided for giving notice of the determination of tax due shall not apply. Such determination of tax due shall fix the tax finally and irrevocably unless the person against whom it is assessed, within fifteen days after the giving of notice of such determination, shall apply to the commissioner pursuant to chapter 28-32 for a hearing or unless the commissioner of his own motion shall reduce the same. At such hearing evidence may be offered to support such determination or to prove that it is incorrect. After such hearing the commissioner shall give notice of his decision to the person liable for the tax pursuant to the provisions of chapter 28-32.

SOURCE: N.D.C.C.; S.L. 1973, ch. 480, §3.

57-39.2-17. SERVICE OF NOTICE.--
1. * * * [Same as parent volume.]
2. Repealed by S.L. 1973, ch. 480, §6.

SOURCE: N.D.C.C.; S.L. 1973, ch. 480, §6.

57-39.2-18. PENALTIES, OFFENSES.--
1. * * * [Same as parent volume.]
2. Any person who shall sell tangible personal property, tickets or admissions to places of amusement, and athletic events, or steam, gas, water, electricity, and communication service at retail in this state after his permit shall have been revoked, or without procuring a permit within sixty days after the effective date of this chapter, as provided in section 57-39.2-14, or who shall violate the provisions of section 57-39.2-09, and the officers of any corporation who shall so act, shall be guilty of a class A misdemeanor.
3. Repealed by S.L. 1975, ch. 106, §673.
4. * * * [Same as parent volume.]
5. Any person failing to comply with any of the provisions of this chapter, or failing to remit within the time herein provided to the state the tax due on any sale or purchase of tangible personal property subject to said sales tax, shall be guilty of a class A misdemeanor.

SOURCE: N.D.C.C.; S.L.; 1975, ch. 106, §§ 610, 673.

57-39.2-23. INFORMATION DEEMED CONFIDENTIAL.--It shall be unlawful for the commissioner, or any person having an administrative duty under this chapter, to divulge, or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person or corporation visited or examined in the discharge of official duty, or the amount or sources of income, profits, losses, expenditures or any particulars thereof, set forth or disclosed in any return, or to permit any return or copy thereof or any book containing any abstract of particulars thereof to be seen or examined by any person except as provided by law. The commissioner may authorize examination of such returns by other state officers, and at his discretion furnish to the tax officials of another state, the multistate tax commission, the District of Columbia, the United States and its territories, any information contained in the tax returns and reports and related schedules and documents filed pursuant to this chapter, and in the report of an audit or investigation made with respect thereto, provided only that said information be furnished solely for tax purposes; and the multistate tax commission may make said information available to the tax officials of any other state, the District of Columbia, the United States and its territories for tax purposes.

The commissioner is hereby authorized to furnish to the workmen's compensation bureau or to the unemployment compensation

division of the employment security bureau upon request of either a list or lists of holders of permits issued pursuant to the provisions of this chapter or chapter 57-40.2, together with the addresses and tax department file identification numbers of such permit holders, provided that any such list shall be used by the bureau to which it is furnished only for the purpose of administering the duties of such bureau. The commissioner, or any person having an administrative duty under this chapter, is hereby authorized to announce that a permit has been revoked.

SOURCE: N.D.C.C.; S.L. 1973, ch. 480, §4; 1975, ch. 106, §611.

57-39.2-24. CORRECTION OF ERRORS.--If it shall appear that, as a result of a mistake, an amount of tax, penalty, or interest has been paid which was not due under the provisions of this chapter, then such amount shall be credited against any tax due, or to become due, under this chapter from the person who made the erroneous payment, or such amount shall be refunded to such person, provided that the person who made the erroneous payment shall present a claim for refund or credit to the commissioner not later than three years after the due date of the return for the period for which the erroneous payment was made or one year after the erroneous payment was made, whichever is later.

SOURCE: N.D.C.C.; S.L. 1973, ch. 480, §5.

CHAPTER 57-40.2

USE TAX

SECTION

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57-40.2-16 Lien of tax - Collection - Action authorized.
57-40.2-17 Disposition of excess tax collections.

57-40.2-01 DEFINITIONS.--In this chapter, unless the context and subject matter otherwise require:

1. "Persons", "sale", "retail sale", "business", "gross receipts", "relief agency", "commissioner", "local governmental unit", each shall have the meaning given to it in section 57-39.2-01.
2. "Use" shall mean the exercise by any person of any right or power over tangible personal property incident to the ownership or possession of that property, except that it shall not include processing, or the sale of that property in the regular course of business. "Use" shall also mean the severing of sand or gravel from the soil of this state.
3. Property used in "processing", as that term is used in subsection 2, shall mean any tangible personal property including containers which it is intended, by means of fabrication, compounding, manufacturing, producing or germination, shall become an integral or an ingreident or component part of other tangible personal property intended to be sold ultimately at retail. The purchase of an item of tangible personal property for the purpose of incorporating it in or attaching it to real property shall

be considered as a purchase of tangible personal property for a purpose other than for processing.

4. "Purchase" means any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration. "Purchase" shall also mean the severing of sand or gravel from the soil of this state.

5. "Purchase price" means the total amount for which tangible personal property is sold, leased, or rented, valued in money, whether paid in money or otherwise, but cash discounts and trade-ins allowed and taken on sales shall not be included. "Purchase price" shall also mean, in those instances where sand or gravel is not sold at retail as tangible personal property by the person severing the sand or gravel, the fair market value of the sand or gravel severed. If the sand or gravel is not sold at retail by the person severing the sand or gravel, it shall be presumed until the contrary is shown by the tax commissioner or by the person severing the sand or gravel that the fair market value is eight cents per ton of two thousand pounds. Where records are not kept as to the tonnage of sand or gravel severed from the soil

it shall be presumed for the purpose of this chapter that one cubic yard of sand or gravel shall be equal to one and one-half tons of sand or gravel.

6. "Tangible personal property" means:
   a. Tangible goods, wares, and merchandise, and gas, electricity, and water, when furnished or delivered to consumers or users within this state;
   b. The leasing or renting of tangible personal property, the sale, storage, use, or consumption of which has not been previously subjected to a retail sales or use tax in this state;
   c. The purchase of subscriptions to magazines or other periodicals regardless of whether or not such magazines or periodicals are to be delivered in the future and regardless of whether or not they are in existence at the time of the sale of any subscriptions; provided that the words "magazines and other periodicals" as used herein shall not include newspapers nor shall they include magazines or periodicals that are furnished free by a nonprofit corporation or organization to its members or because

of payment by its members of membership fees or dues.

d. The severance of sand or gravel from the soil.

7. "Retailer" includes every person engaged in the business of selling tangible personal property for use within the meaning of this chapter, but, when in the opinion of the commissioner, it is necessary for the efficient administration of this chapter to regard any salesman, representative, trucker, peddler, or canvasser as the agent of the dealer, distributor, supervisor, employer, or other person under whom he operates or from whom he obtains the tangible personal property sold by him, whether he is making sales in his own behalf or in behalf of such dealer, distributor, supervisor, employer, or other person, the commissioner may regard him as such agent, and may regard the dealer, distributor, supervisor, employer, or other person as a retailer for the purposes of this chapter.

8. "Retailer maintaining a place of business in this state", or any like term, shall mean any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, whether such place of business or agent is

located in the state permanently or temporarily, or whether or not such retailer or subsidiary is authorized to do business within this state.

9. "Purchased at retail" shall include, but shall not be limited to:

a. The completion of the fabricating, compounding, or manufacturing of tangible personal property by a person for storage, use, or consumption by that person;

b. The leasing or renting of tangible personal property, the sale, storage, use, or consumption of which has not been previously subjected to a retail sales or use tax in this state;

c. The purchase of subscriptions to magazines or other periodicals regardless of whether or not such magazines or periodicals are to be delivered in the future and regardless of whether or not they are in existence at the time of the sale of any subscriptions; provided that the words "magazines and other periodicals" as used herein shall not include newspapers nor shall they include magazines or periodicals that are furnished free by a nonprofit

corporation or organization to its members or because of payment by its members of membership fees or dues.

d. The severance of sand or gravel from the soil.

e. The purchase, including the leasing or renting, of tangible personal property from any bank for storage, use or consumption.

SOURCE: S.L. 1967, ch. 459, §26; 1969, ch. 472, §4; 1969, ch. 519, §2.

57-40.2-02. TAX IMPOSED.--An excise tax is imposed on the storage, use, or consumption in this state of tangible personal property purchased at retail for storage, use, or consumption in this state, at the rate of two and one-quarter percent of the purchase price of such property. Except as limited by section 57-40.2-11 an excise tax is imposed on the storage, use, or consumption in this state of tangible personal property not originally purchased for storage, use, or consumption in this state at the rate of two and one-quarter percent of the fair market value of such property at the time it was brought into this state. In the case of a contract awarded for the construction of highways, roads, streets, bridges, and buildings prior to April 1, 1967, the contractor receiving the award shall be liable only for the use tax at the rate of tax in effect on the date of contract.

SOURCE: S.L. 1967, ch. 459, §28; 1967, ch. 460, §4.

57-40.2-03. SEPARATE AND ADDITIONAL USE TAX.--An excise tax is imposed on the storage, use, or consumption in this state of tangible personal property purchased at retail for storage, use, or consumption in this state, at the rate of three-quarters of one percent of the purchase price of such property, which tax shall be in addition to any other tax provided for by law. An excise tax is imposed on the storage, use, or consumption in this state of tangible personal property not originally purchased for storage, use or consumption in this state at the rate of three-quarters of one percent of the fair market value of such property at the time it was brought into this state. In the case of any contract awarded for the construction of highways, roads, streets, bridges, and buildings prior to April 1, 1967, the contractor receiving the award, shall be liable only for the use tax at the rate of tax in effect on the date of the contract. All definitions of terms, provisions for collection and delinquency, exemptions, assessments, penalties, refunds, notices and appeals, and all other provisions contained and provided for in this chapter, and any other provisions of law now in effect or which may become effective relating to the use tax, shall apply and are hereby made applicable to the tax imposed under the provisions of this section.

SOURCE: S.L. 1967, ch. 460, §8; 1967, ch. 461, §3.

57-40.2-03.1. SEPARATE AND ADDITIONAL USE TAX.--An excise tax is imposed effective January 1, 1970, on the storage, use, or consumption in this state of tangible personal property purchased at retail for storage, use, or consumption in this state, at the rate of one percent of the purchase price of such property, which tax shall be in addition to any other taxes provided by law. An excise tax is imposed on the storage, use, or consumption in this state of tangible personal property not originally purchased for storage, use, or consumption in this state at the rate of one percent of the fair market value of such property at the time it was brought into this state. In the case of any contract awarded for the construction of highways, roads, streets, bridges, and buildings prior to January 1, 1970, the contractor receiving the award shall be liable only for the use tax at the rate of tax in effect on the date of the contract. All definitions of terms, provisions for collection and delinquency, exemptions, assessments, penalties, refunds, notices and appeal, and all other provisions contained and provided for in this chapter, and any other provisions of law now in effect or which may become effective relating to the use tax, shall apply and are hereby made applicable to the tax imposed under the provisions of this section.
SOURCE: S.L. 1969, ch. 528, §14.

57-40.2-03.2. USE TAX ON ALCOHOLIC BEVERAGES, TOBACCO PRODUCTS, AND OLEOMARGARINE.--Notwithstanding any other provision of law, the use taxes imposed by this chapter shall apply to the storage, use, or consumption in this state beginning July 1, 1969, of alcoholic beverages as defined in section 5-01-01, whether mixed or unmixed at the time of sale or thereafter, and whether sold for consumption on the premises or through off-sale outlets for consumption off the premises, and cigarettes, cigars, other tobacco products, and oleomargarine, provided that gross receipts from the sale thereof shall mean and include any other taxes imposed on such merchandise or its use or on the retail or other sale thereof.
SOURCE: S.L. 1969, ch. 528, §15.

57-40.2-04. EXEMPTIONS.--This chapter hereby is declared to be an independent and separate tax law but complementary to the retail sales tax laws of this state provided for by chapter 57-39.2 and shall not apply to:

1. Any tangible personal property or taxable service upon the sale of which the retail sales tax imposed by chapter 57-39.2 has been collected by a retailer holding the permit prescribed by section 57-39.2-14.
2. Tangible personal property brought into this state by a nonresident thereof for his own storage, use, or consumption while temporarily within this state, except that such

property shall not be exempt if brought into this state for storage, use, or consumption in the conduct of a trade, occupation, business, or profession.

3. The sale of any motor vehicle taxable under the provisions of the motor vehicle excise tax laws of North Dakota.
4. Tangible personal property upon which the state now imposes and collects a special tax, whether in the form of license tax, stamp tax, or otherwise.
5. Railway cars and locomotives used in interstate commerce, and tangible personal property which becomes a component part thereof.
6. Newsprint and ink actually used in the publication of a newspaper.
7. Mixed drinks which are composed of alcoholic beverages and nonalcoholic beverages, or ingredients such as sugar, ice, flavoring syrups, soda-water, pop, malt, and other commodities of a like nature, or any combination thereof when mixed with an alcoholic beverage.
8. Gross receipts from the leasing or renting of motion picture film to motion picture exhibitors for exhibition in this state if the sale of the tickets or admissions to the exhibition of the film is subject to the sales tax imposed by chapter 57-39.2.

9. Commercial fertilizers, fungicides, seed treatments, inoculants and fumigants, herbicides and insecticides used by agricultural or commercial vegetable producers and commercial applicators; chemicals used to preserve agricultural crops being stored; and seeds, roots, bulbs, and small plants used by commercial users or consumers for planting or transplanting for commercial vegetable gardens or agricultural purposes.
10. Gross receipts from the leasing, or renting, for residential housing, for periods of more than thirty consecutive days, of factory manufactured homes, including mobile homes, modular living units, or sectional homes, whether or not placed on a permanent foundation.

SOURCE: S.L. 1967, ch. 459, §29; 1967, ch. 460, §5; 1969, ch. 520, §2; 1969, ch. 522, §2; 1969, ch. 523, §2; 1971, ch. 571, §2.

57-40.2-04.1. USE TAX EXEMPTION FOR CERTAIN FOOD PRODUCTS.--Beginning January 1, 1970, gross receipts from sales for human consumption of milk and milk products and of fresh and cured meat, including poultry and fish and other fresh and salt-water animal products when purchased by consumers for consumption off the premises where purchased, shall be exempt from the use tax imposed by chapter 57-40.2, except that fresh and

cured meat, fish and other fresh and salt-water animal products shall not include such products if preserved by enclosure in an airtight container.
SOURCE: S.L. 1969, ch. 528, §19.

57-40.2-05. EVIDENCE OF USE.--For the purpose of the proper administration of this chapter, and to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.
SOURCE: S.L. 1967, ch. 459, §30.

57-40.2-06. PAYMENT OF TAX.--The tax imposed by this chapter shall be paid in the following manner:

1. The tax upon tangible personal property which is sold by a retailer maintaining a place of business in this state, or by such other retailer as the tax commissioner shall authorize pursuant to subsection 2 of section 57-40.2-07, shall be collected by the retailer and remitted to the commissioner as provided by section 57-40.2-07, provided, that any such retailer shall not collect the tax on any purchases made by a contractor who furnishes to the retailer a certificate which includes the contractor's license number assigned to him under the provisions of chapter 43-07 and the use tax account

number assigned to him by the tax commissioner pursuant to section 43-07-04. Such certificate shall be in the form prescribed by the tax commissioner and shall be furnished by the contractor to the retailer each calendar year prior to the making of any purchases during such calendar year from the retailer without liability for paying the tax to the retailer. Any contract awarded prior to April 1, 1967, the contractor receiving the award, shall be liable only for the use tax at the rate of tax in effect on the date of the contract.

2. The tax, when not paid in conformity with subsection 1 of this section, shall be paid to the tax commissioner directly by any person storing, using, or consuming such property within this state, pursuant to the provisions of section 57-40.2-07.

SOURCE: S.L. 1967, ch. 459, §31.

57-40.2-07. COLLECTION OF USE TAX.--The tax imposed by this chapter shall be collected in the following manner:

1. Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state, not exempted under the provisions of section 57-40.2-04, before making any sales shall obtain a permit

from the commissioner to collect the tax imposed by this chapter, which permit shall be subject to all of the requirements, conditions and fees for its issuance that apply with respect to a retail sales tax permit, and at the time of making such sales, whether within or without the state, shall except as otherwise provided in subsection 1 of section 57-40.2-06, collect the tax imposed by this chapter from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the tax commissioner, if the commissioner, by regulation, shall require such receipt. Each such retailer shall list with the tax commissioner the name and address of all his agents operating in this state, and the location of each of his distribution or sales houses or offices or other places of business in this state.

2. The tax commissioner, upon application, may authorize the collection of the tax imposed by this chapter by any retailer not maintaining a place of business within the state, who, to the satisfaction of the commissioner, furnishes adequate security to ensure collections and payment of the tax. To such retailer shall be issued a permit to collect the tax

in such manner and subject to such regulations and agreements as the commissioner shall prescribe. When so authorized, such retailer shall, except as otherwise provided in subsection 1 of section 57-40.2-06, collect the tax upon all tangible property sold to his knowledge for use within this state, as a retailer maintaining a place of business within this state collects such tax. Such authority and permit may be canceled at any time, if the commissioner considers the security inadequate, or believes that such tax can be collected more effectively from the person using such property in this state.

3. The tax required to be collected, and any tax collected, by any retailer under subsections 1 and 2 of this section shall constitute a debt owed by the retailer to this state.

4. Each retailer required or authorized, pursuant to this section, to collect such tax shall pay the tax in quarterly installments on or before the last day of the month next succeeding each quarterly period ending March thirty-first, June thirtieth, September thirtieth, and December thirty-first of each year. Except that when there is a sale of any business by any

retailer required or authorized, pursuant to this section, to collect such tax or when any business is discontinued by such retailer,the tax shall become due immediately prior to the sale or discontinuance of such business and if not paid within fifteen days thereafter it shall become delinquent and subject to the penalties provided in section 57-40.2-15. Every retailer, at the time of making the return required by this chapter, shall compute and pay to the commissioner the tax due for the preceding period.

5. The retailer, on or before the last day of the month following the close of the first quarterly period as defined in subsection 4 of this section, and on or before the last day of the month following each subsequent quarterly period of three months, shall make out a return for the preceding quarterly period in such form and manner as may be prescribed by the commissioner, showing the gross receipts of the retailer, the amount of the tax for the period covered by such return, and such further information as the tax commissioner may require to enable him correctly to compute and collect such tax, but the tax commissioner, upon receipt of a proper showing by any retailer of the

necessity therefor, may grant unto such retailer an extension of time not to exceed thirty days for making such return. If such extension is granted to any retailer, the time in which he is required to make payment shall be extended for the same period. The commissioner, if he deems it necessary or advisable in order to ensure the payment of the tax, or if he deems it practical, may require returns and payments of the tax to be made for annual periods or other than quarterly periods, the provisions of this chapter to the contrary notwithstanding. A return shall be signed by the taxpayer or his duly authorized agent and shall contain a written declaration that it is made and subscribed under penalties of this chapter.

6. Any person who uses any property upon which the said tax has not been paid, either to the retailer or directly to the tax commissioner, shall be liable therefor, and, on or before the last day of the month next succeeding each quarterly period, shall pay the tax upon all such

property used by him during the preceding quarterly period, in such manner and accompanied by such returns as the commissioner shall prescribe.

7. The commissioner, when in his judgment it is necessary and advisable to do so in order to secure the collection of such tax, may require any person subject to the tax to file with him a bond, issued by a surety company authorized to transact business in this state and approved by the insurance commissioner as to solvency and responsibility, in such amount as the commissioner may fix, to secure the payment of any tax or penalties due or which may become due from such person. In lieu of such bond, securities approved by the tax commissioner, in an amount which he may prescribe, may be deposited with him, and such securities shall be kept in the custody of the commissioner, and may be sold by him at public or private sale, without notice to the depositor thereof, if it becomes necessary so to do in order to recover any tax or penalties due. Upon such sale, the surplus, if any remains above the amounts due, shall be returned to the person who deposited the securities.

8. The commissioner may adopt and promulgate rules and regulations for adding such tax, or the average equivalent thereof, by providing different methods applying uniformly to retailers within the same general classification for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax.

SOURCE: S.L. 1967, ch. 459, §32; 1969, ch. 524, §2.

57-40.2-08. UNLAWFUL ADVERTISING - PENALTY.--It shall be unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer, or user, directly or indirectly, that the tax or any part thereof imposed by this chapter will be assumed or absorbed by the retailer, or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any provision of this section within this state is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars for each offense or by imprisonment for not to exceed thirty days, or by both such fine and imprisonment.

SOURCE: S.L. 1967, ch. 459, §33.

57-40.2-09. RECORDS REQUIRED.--Each retailer required or authorized to collect the tax imposed by this chapter, and each person using in this state tangible personal property purchased shall keep such records, receipts, invoices, and other pertinent papers as the tax commissioner shall require and each such retailer or person shall preserve for a period of three years all invoices and other records of such tangible personal property purchased for resale or for use. The commissioner, or any duly authorized agent, may examine the books, papers, records, and equipment of any person who sells tangible personal property or who is liable for such tax, and may investigate the character of the business of any such person to verify the accuracy of any return made, or if no return was made, to ascertain and determine the amount due. Any such books, papers, and records shall be made available within this state for such examination upon reasonable notice if the tax commissioner shall make an order to that effect.
SOURCE: S.L. 1967, ch. 459, §34; 1967, ch. 460, §6; 1971, ch. 573, §3.

57-40.2.10. REVOCATION OF PERMIT AND AUTHORITY TO DO BUSINESS.--If any retailer maintaining a place of business in this state, or authorized to collect the tax imposed by this chapter, fails to comply with any of the provisions of this chapter, or with any order or regulation of the tax commissioner, the commissioner, by order, may revoke the permit, if any was issued to such retailer, or if the retailer is a corporation authorized to

do business in this state, the commissioner may certify to the secretary of state a copy of an order finding that such retailer has failed to comply with certain specified provisions, orders, rules, or regulations. The secretary of state, upon receipt of such certified copy, may revoke the certificate authorizing such corporation to do business in this state, and shall issue a new certificate only when the corporation shall have obtained from the commissioner an order finding that the corporation has complied with its obligations under this chapter. Any order shall be made under this section only after a retailer has had an opportunity, upon ten days' notice of the time, place, and purpose of a hearing, to show cause why such order should not be made. The tax commissioner may issue a new permit after a revocation.
SOURCE: S.L. 1967, ch. 459, §35.

57-40.2-11. ARTICLES TAXED IN OTHER STATES OR POLITICAL SUBDIVISIONS OF OTHER STATES.--If any article or tangible personal property has been subjected already to a tax by any other state or political subdivision thereof in respect to its sale or use in an amount less than the tax imposed by this chapter, the provisions of this chapter shall apply, but at a rate measured by the difference only between the rate fixed in this chapter and the rate by which the previous tax upon the sale or use was computed. If the tax imposed in such other state is the same or more, then no tax shall be

due on such article. The provisions of this section shall apply only if such other state or political subdivision thereof allows a tax credit with respect to the retail sales and use taxes imposed by this state which is substantially similar in effect to the credit allowed by this section.
SOURCE: S.L. 1967, ch. 459, §36.

57-40.2-12. UNLAWFUL SALE OR SOLICITING - PENALTY.--No agent, canvasser, or employee of any retailer, not authorized by permit from the tax commissioner of this state, shall collect the tax as prescribed by this chapter, nor sell, solicit orders for, nor deliver, any tangible personal property in this state. Any such agent, canvasser, or employee violating the provisions of this chapter is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars for each offense, or by imprisonment for not more than thirty days, or by both such fine and imprisonment.
SOURCE: S.L. 1967, ch. 459, §37.

57-40.2-13. PROVISIONS OF SALES TAX LAW APPLICABLE.--The provisions of chapter 57-39.2, pertaining to the administration of the retail sales tax, including provisions for refund or credit provided therein, not in conflict with the provisions of this chapter, shall govern the administration of the tax levied in this chapter.
SOURCE: S.L. 1967, ch. 459, §38.

57-40.2-14. CONTRACTOR'S PERFORMANCE BONDS FOR PAYMENT OF USE TAX.--For the purposes of this section the term "surety" shall mean a bond or undertaking executed by a surety company authorized to do business in the state of North Dakota; "surety company" means any person, firm, or corporation executing such surety; "contractor" includes any individual, firm, copartnership, association, corporation, or other group or combination thereof acting as a unit, and the plural as well as the singular number; and "subcontractor" includes any individual, firm, copartnership, association, corporation, or other group or combination thereof acting as a unit, and the plural as well as the singular number, who undertakes to perform all or any part of work covered by the original contract entered into by the contractor, including the furnishing of any supplies, materials, equipment, or any other tangible personal property.

Whenever any contractor or subcontractor enters into any contract for the erection of buildings or the alteration, improvement or repair of real property in this state and the contractor or subcontractor furnishes surety for the faithful performance of such contract, there is hereby imposed the additional obligation upon the surety company to the state of North Dakota that said contractor or subcontractor shall promptly pay all use taxes which may accrue to the state of North Dakota under the provisions of this chapter. In the case of a contractor and his surety company this additional obligation shall include liability to pay

to the tax commissioner on purchases made by either the contractor or the subcontractor all such use taxes which have not been paid to a retailer authorized or required to collect such taxes; and the contractor or his surety company is hereby authorized to recover from the subcontractor the amount of any use taxes accruing with respect to purchases made by the subcontractor which the contractor or the surety company may be required tc pay to the tax commissioner, or to withhold from the amount due the subcontractor under the subcontract an amount equal to any use taxes accruing with respect to purchases of the subcontractor which have not been paid by the subcontractor to the tax commissioner or to a retailer authorized or required to collect such taxes. Such liability on the part of the surety company shall be limited to three percent of the amount of the contract price.

The surety company within sixty days after executing such surety shall send written notice of the same to the state tax commissioner, which notice shall give the names and addresses of the parties contracting with respect to the real property and the place where the contract is to be performed. After the completion of the contract and the acceptance of the improvement by the owner of the real property improved, the surety company shall give written notice of such completion and acceptance to the state tax commissioner.

Six months after the completion of the contract and the acceptance of the improvement by the owner thereof, the additional obligation imposed upon said surety company shall cease unless written notice, within such period of time, of unpaid use taxes, is given to the surety company by the state tax commissioner.

This section shall not be construed to modify or repeal in any way any of the provisions of sections 48-01-05 and 48-01-06.
SOURCE: S.L. 1967, ch. 459, §39.

57-40.2-15. PENALTIES - OFFENSES.--
1. Any person failing to file a return or corrected return or to pay any tax imposed pursuant to this chapter, within the time required by this chapter, shall be subject to a penalty of five percent of the amount of tax due or of five dollars, whichever is greater, plus one percent of such tax for each month of delay or fraction thereof, excepting the first month after such return was required to be filed or such tax became due. The commissioner, if satisfied that the delay was excusable, may waive and if paid, refund all or any part of such penalty. Such penalty shall be paid to the commissioner and disposed of in the same manner as the tax with respect to which it is attached. Unpaid penalties may be enforced in the same manner as is the tax.

2. Any person required to make, render, sign or verify any return or supplementary return, who makes any false or fraudulent return with intent to defeat or evade the assessment required by law to be made, shall be guilty of a misdemeanor and, for each such offense, shall be fined not to exceed five hundred dollars or shall be imprisoned in the county jail not exceeding one year, or shall be subject to both a fine and imprisonment, in the discretion of the court.

3. The certificate of the commissioner to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this chapter, shall be prima facie evidence thereof.

4. Any person failing to comply with any of the provisions of this chapter, or failing to remit within the time herein provided to the state the tax due on any sale or purchase of tangible personal property subject to the tax imposed under the provisions of this chapter, shall be guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by a fine of not exceeding five hundred dollars, or by both such fine and imprisonment, in the discretion of the court. This criminal liability shall be cumulative and in addition to the civil liability for penalties hereinbefore provided.

SOURCE: S.L. 1967, ch. 459, §40; 1969, ch. 526, §2.

57-40.2-16. LIEN OF TAX - COLLECTION - ACTION AUTHORIZED.--1. Whenever any person liable for payment to the tax commissioner of the tax imposed by this chapter or for any penalties in respect thereto refuses or neglects to pay the same the amount, including any interest, penalty, or addition to such tax, together with the costs that may accrue in addition thereto, shall be a lien in favor of the state of North Dakota upon all property and rights to property, whether real or personal, belonging to said taxpayer, and in the case of property in which a deceased taxpayer held an interest as joint tenant or otherwise with right of survivorship at the time of his death, the lien shall continue as a lien against the property in the hands of the survivor or survivors to the extent of the deceased taxpayer's interest therein, which interest shall be determined by dividing the value of the entire property at the time of the taxpayer's death by the number of joint tenants or persons interested therein.

2. The lien aforesaid shall attach at the time the tax first becomes payable, as provided by section 57-40.2-07, and shall continue until the liability for such amount is satisfied.

3. In order to preserve the aforesaid lien against subsequent mortgagees, purchasers, or judgment creditors, for value and without notice of the lien, on any property situated in a county, the tax commissioner shall file with the register of deeds of the county in which said property is located, a notice of said lien.

4. The register of deeds of each county shall prepare and keep in his office a book known as "Index of Tax Liens", so ruled as to show in appropriate columns all of the following data, under the names of taxpayers, arranged alphabetically:

a. The name of the taxpayer.
b. The name "State of North Dakota" as claimant.
c. Time notice of lien was received.
d. Date of notice.
e. Amount of lien then due.
f. When satisfied.

The register of deeds shall endorse on each notice of lien the day, hour and minute when received and preserve the same, and forthwith shall index said notice in said index books and forthwith shall record said lien in the manner provided for recording real estate mortgages, and the said lien shall be effective from the time of the indexing thereof.

5. The tax commissioner shall be exempt from the payment of the recording and filing fees as otherwise provided by law for the recording and filing of such lien, or for the satisfaction thereof.

6. Upon the payment of a tax as to which the tax commissioner has filed notice with the register of deeds, the tax commissioner forthwith shall file with said register of deeds a satisfaction of said tax and the register of deeds shall enter said satisfaction on the notice on file in his office and indicate said fact on the index aforesaid.

7. The attorney general, upon the request of the tax commissioner, shall bring an action at law or in equity, as the facts may justify, without bond to enforce payment of any taxes and any penalties, or to foreclose the lien therefor in the manner provided for mortgages on real or personal property, and in such action he shall have the assistance of the state's attorney of the county in which the action is pending.

8. It is expressly provided that the foregoing remedies of the state shall be cumulative and that no action taken by the tax commissioner or attorney general shall be construed to be an election on the part of the state or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy provided by law.

9. The technical, legal requirements outlined in this section relating to tax liens on all real and personal property of the taxpayer to ensure payment of the taxes, including penalties, interest and other costs, are self-explanatory.

10. Remittances on account of tax due under this chapter shall not be deemed or considered payment thereof unless or until the commissioner shall have collected or received the amount due for such tax in cash or equivalent credit.

SOURCE: S.L. 1967, ch. 459, §41.

57-40.2-17. DISPOSITION OF EXCESS TAX COLLECTIONS.--Whenever a retailer maintaining a place of business in this state has collected a use tax from a customer in excess of the amount prescribed or due under this chapter, and if the retailer does not refund the excessive tax collected to the customer, the amount so collected by the retailer shall be paid by the retailer to the tax commissioner in the quarterly period in which the excessive collection occurred. If the excessive collection is subsequently refunded by the retailer to the customer, the retailer may deduct, as a credit against his use tax liability on the next return that he is required to file, the amount of use tax properly refunded to the customer. In the event such deduction exceeds the amount of use tax due the state by the retailer in the next regular return, such excess shall be allowed as a credit against future use tax due from the retailer. If the credit, or any part of it cannot be utilized by the retailer because of a discontinuance of a business or for other valid reasons, the amount thereof may be refunded to the retailer.
SOURCE: S.L. 1969, ch. 527, §2.

REPLACEMENT VOLUME 11

1975 POCKET SUPPLEMENT

CHAPTER 57-40.2 - USE TAX

CHAPTER 57-40.2

USE TAX

SECTION
57-40.2-03.2 Use tax on alcoholic beverages and tobacco products.
57-40.2-04 Exemptions.
57-40.2-04.1 Use tax exemption for food and food products.
57-40.2-08 Unlawful advertising.
57-40.2-12 Unlawful sale or soliciting.
57-40.2-15 Penalties - Offenses.

57-40.2-03.2. USE TAX ON ALCOHOLIC BEVERAGES AND TOBACCO PRODUCTS.--Notwithstanding any other provisions of law, the use taxes imposed by this chapter shall apply to the storage, use, or consumption in this state beginning July 1, 1973, of alcoholic beverages as defined in section 5-01-01, whether mixed or unmixed at the time of sale or thereafter,and whether sold for consumption on the premises or through off-sale outlets for consumption off the premises, and cigarettes, cigars, and other tobacco products, provided that gross receipts from the sale thereof shall mean and include any other taxes imposed on such merchandise or its use or on the retail or other sale thereof.

SOURCE: N.D.C.C.; S.L. 1973, ch. 465, §5.

57-40.2-04. EXEMPTIONS.--This chapter hereby is declared to be an independent and separate tax law but complementary to the retail sales tax laws of this state provided for by chapter 57-39.2 and shall not apply to:

1 to 10. * * * [Same as parent volume.]

11. Bibles, hymnals, textbooks, and prayerbooks used by nonprofit religious organizations.

12. Gross receipts from sales of:

a. Artificial devices individually designed, constructed, or altered solely for the use of a particular crippled person so as to become a brace, support, supplement, correction, or substitute for the bodily structure including the extremities of the individual.

b. Artificial limbs, artificial eyes, hearing aids, and other equipment worn as a correction or substitute for any functioning portion of the body.

c. Artificial teeth sold by a dentist.

d. Eye glasses when especially designed or prescribed by an ophthalmologist, physician, oculist, or optometrist for the personal use of the owner or purchaser.

e. Crutches and wheelchairs for the use of invalids and crippled persons.

SOURCE: N.D.C.C.; S.L. 1975, ch. 550, §2; 1975, ch. 551, §2.

57-40.2-04.1. USE TAX EXEMPTION FOR FOOD AND FOOD PRODUCTS.--Beginning July 1, 1973, gross receipts from sales for human consumption of food and food products including but not limited to cereal and cereal products, butter, cheese, milk and milk products, oleomargarine, meat and meat products, poultry and fish and other fresh and salt-water animal products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products including candy and confectionary products, chewing gum, coffee and coffee substitutes, tea, cocoa and cocoa products, and carbonated beverages when purchased by consumers for consumption off the premises where purchased, shall be exempt from the use tax imposed by chapter 57-40.2. "Food" and "food products" as used herein shall not include any alcoholic beverages or mixed drinks made therefrom, bottled water, or medicines and preparations in liquid, powdered, granular, tablet, capsule, lozenge, and pill form sold as dietary supplements or adjuncts.

SOURCE: N.D.C.C.; S.L. 197 , ch. 465, §6.

57-40.2-08. UNLAWFUL ADVERTISING.--It shall be unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer, or user, directly or indirectly, that the tax or any part thereof imposed by this chapter will be assumed or absorbed by the retailer, or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded.

SOURCE: N.D.C.C.; S.L. 1975, ch. 106, §612.

57-40.2-12. UNLAWFUL SALE OR SOLICITING.--No agent, canvasser, or employee of any retailer, not authorized by permit from the tax commissioner of this state, shall collect the tax as prescribed by this chapter, nor sell, solicit orders for, nor deliver, any tangible personal property in this state.

SOURCE: N.D.C.C.; S.L. 1975, ch. 106, §613.

57-40.2-15. PENALTIES - OFFENSES. --1. * * * [Same as parent volume.]

2. Repealed by S.L. 1975, ch. 106, §673.
3. * * * [Same as parent volume.]
4. Any person failing to comply with any of the provisions of this chapter, or failing to remit within the time herein provided to the state the tax due on any sale or purchase of tangible personal property

subject to the tax imposed under the provisions of this chapter, shall be guilty of a class A misdemeanor.

SOURCE: N.D.C.C.; S.L. 1975, ch. 106, §§614, 673.

NORTH DAKOTA CENTURY CODE

Replacement Volume 5A

Sections 28-32-08, 28-32-13, 28-32-15 and 28-32-19 of the Administrative Agencies Practice Act

28-32-08. SPECIFICATIONS OF ANY ISSUES TO BE FURNISHED BY AGENCY.--Whenever an administrative agency, pursuant to authority conferred upon it by law, shall institute an investigation upon its own motion or without the filing of a specified complaint, or shall hold any hearing or make any independent investigation upon the claim or request of any person, no decision shall be made by the agency until all parties in interest shall have been furnished with a written specification of the issues which are to be considered and determined, nor until an opportunity shall have been afforded to such parties to present evidence and to be heard upon the precise issues so specified. Provided, however, that the commissioners of the workmen's compensation bureau may make determinations without the giving of the notice herein provided for. This provision shall not be construed to relieve the commissioners of the workmen's compensation bureau of the requirements of section 28-32-13 of this chapter.

SOURCE: S.L. 1941, ch. 240, §8; R.C. 1943, §28-3208; S.L. 1945, ch. 219, §1; 1957 Supp., §28-3208; S.L. 1971, ch. 313, §1.

28-32-13. FINDINGS OF FACT, CONCLUSIONS, AND DECISION OF AGENCY - NOTICE.--Within thirty days after the evidence has been received, briefs filed, and arguments closed in a proceeding before an administrative agency, or as soon thereafter as possible, the agency shall make and state concisely and explicitly its findings of fact and its separate conclusions of law, and the decision of the agency based upon such findings and conclusions. The agency

shall give notice of its decision or determination in any proceeding heard by it by delivering a copy of such decision or determination to all the parties to the proceeding either personally or by registered or certified mail, and if such notice is given by registered or certified mail, the notice shall be deemed given as of the date of the registry or certification.

SOURCE: S.L. 1941, ch. 240, §13; R.C. 1943, §28-3213.

28-32-15. APPEAL FROM DETERMINATION OF AGENCY - TIME TO APPEAL - HOW APPEAL TAKEN.--Any party to any proceeding heard by an administrative agency, except in cases where the decision of the administrative agency is declared final by any other statute, may appeal from such decision within thirty days after notice thereof has been given, or if a rehearing has been requested as provided herein and denied, within thirty days after notice of such denial has been mailed to him. Such appeal may be taken to the district court designated by law, and if none is designated, then to the district court of the county wherein the hearing or a part thereof was held. Only final orders or decisions and orders or decisions substantially affecting the rights of parties are appealable. A procedural order made by an administrative agency during the pending of a hearing before it shall not be deemed a final order nor an order affecting a substantial right. Such appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an

assistant attorney general, and upon all the parties to the proceeding before such administrative agency, and by filing the notice of appeal and specifications of error together with proof of service thereof, and the undertaking herein required, with the clerk of the district court to which such appeal is taken. An undertaking must be executed by the appellant, with sufficient surety to be approved by the judge of the district court, conditioned that the appellant will prosecute such appeal without delay and will pay all costs adjudged against him in the district court. Such undertaking shall be made to the state of North Dakota and may be enforced by the agency concerned for and on behalf of the state as obligee.

SOURCE: S.L. 1941, ch. 240, §15; R.C. 1943, §28-3215.

28-32-19. SCOPE OF AND PROCEDURE ON APPEAL FROM DETERMINATION OF ADMINISTRATIVE AGENCY.--The court shall try and hear an appeal from the determination of an administrative agency without a jury and the evidence considered by the court shall be confined to the record filed with the court. If additional testimony is taken by the administrative agency or if additional findings of fact, conclusions of law, or a new decision shall be filed pursuant to section 28-32-18, such evidence, findings, conclusions, and decision shall constitute a part of the record filed with the court. After such hearing, the court shall affirm the decision of the agency unless it shall find that such decision or determination is not in accordance with law, or that

it is in violation of the constitutional rights of the appellant, or that any of the provisions of this chapter have not been complied with in the proceedings before the agency, or that the rules or procedure of the agency have not afforded the appellant a fair hearing, or that the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decision of the agency are not supported by its findings of fact. If the decision of the agency is not affirmed by the court, it shall be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the decision of the court.

SOURCE: S.L. 1941, ch. 240, §19; R.C. 1943, §28-3219.

APPENDIX E

NOTICE OF APPEAL TO THE SUPREME COURT

OF THE UNITED STATES

(Pages App. E-1 through App. E-6)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NORTH DAKOTA

SOUTHEASTERN DIVISION

United States of America and Western Electric Company, Incorporated,	)
Plaintiffs,	)
vs.	)
Byron L. Dorgan, as State Tax Commissioner of and for the State of North Dakota, and his successors in office; State Tax Commission of the State of North Dakota; and State of North Dakota,	)
Defendants.	)

CIVIL NO. A3-74-68

Filed and Entered in the United States District Court of North Dakota on June 16, 1976, Cletus J. Schmidt, Clerk

NOTICE OF APPEAL TO THE

SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Byron L. Dorgan as State Tax Commissioner of and for the State of North Dakota, the State Tax Commission of the State of North Dakota, and the State of North Dakota, Defendants above named, hereby appeal to the Supreme Court of the United States from the order granting Plaintiffs' motion for an order to stay, pending a final determination in this action, state administrative tax assessment proceedings and restraining the Defendants, and all persons in active concert or participation with them, from proceeding with the administrative tax proceedings initiated by the Defendant North Dakota State Tax Commissioner, which order was entered in this action on May 17, 1976.

This appeal is taken pursuant to 28 U.S.C. §1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint.
2. Answer.
3. Motion for Order Staying, Pending a Final Determination In This Action, State Administrative Proceedings.
4. Affidavit of Michael B. Andolina, dated September 18, 1974, with attached Exhibits "A", "B" and "C".

5. Affidavit of Kenneth M. Jakes, dated November 7, 1974, with attached Exhibits "A", "B", "C", "D" and "E".
6. Memorandum and Order, dated and entered December 5, 1974 (385 F.Supp. 349).
7. Joint Notice of Appeal to the U.S. Court of Appeals for the Eighth Circuit by the Defendants from the Order entered on December 5, 1974.
8. Opinion of the United States Court of Appeals for the Eighth Circuit (522 F. 2d 969) and Judgment entered on September 10, 1975, vacating stay order of United States District Court and remanding for further proceedings.
9. Letter dated December 18, 1975, to The Honorable Paul Benson, Chief Judge, U.S. District Court, Box 3164, Fargo, ND 58102, from Frank Magill.
10. Letter dated December 22, 1975, to Mr. Frank J. Magill, Attorney at Law, Box 2626, Fargo, N.Dak. 58102, from Cletus J. Schmidt, Clerk, United States District Court, District of North Dakota.

11. Letter dated January 5, 1976, to The Honorable Paul Benson, Chief Judge, United States District Court, P.O. Box 3164, Fargo, North Dakota 58102, from Kenneth M. Jakes, Chief Counsel, Office of the Tax Commissioner, State of North Dakota, Bismarck, North Dakota 58501.
12. Letter dated January 22, 1976, to The Honorable Floyd R. Gibson, Chief Judge, United States Court of Appeals for the Eighth Circuit, United States Court House, Kansas City, Missouri 64106, from Paul Benson, Chief Judge, United States District Court, District of North Dakota, Fargo, North Dakota 58102, requesting that a three-judge court be convened.
13. Application For Convening of Three Judge District Court, made by the Plaintiffs and served on Kenneth M. Jakes, Attorney, State Tax Department, Capitol, Bismarck, N. Dak. 58501.
14. Affidavit of William L. Shraberg, dated January 13, 1976.
15. Order of the Honorable Floyd R. Gibson, Chief Judge of the United States Court of Appeals for the Eighth Circuit, convening a Three-Judge District

Court, dated January 29, 1976
16. Affidavit of Frank J. Magill In Support of Motion for Injunction, dated April 5, 1976.
17. Affidavit of Kenneth M. Jakes In Opposition to Motion for Injunction, dated April 15, 1976.
18. Memorandum and Order of United States Three-Judge District Court, dated and entered May 17, 1976.

III. The following question is presented by this appeal:

Did the Three-Judge District Court abuse its discretion in entering its Memorandum and Order of May 17, 1976, for an interlocutory injunction by which it restrained the defendants, and all persons in active concert and participation with them, from proceeding with the administrative tax proceedings initiated by the Defendant Tax Commissioner for the State of North Dakota, pending a final determination in this case?

ALLEN I. OLSON
Attorney General for the
State of North Dakota

By/s/Kenneth M. Jakes

Kenneth M. Jakes

By/s/Robert W. Wirtz

Robert W. Wirtz

By/s/Albert R. Hausauer

Albert R. Hausauer

Special Assistant Attorneys
General for the State of
North Dakota

Attorneys for the Defendants

Address:
State Capitol
Bismarck, North Dakota
58505

No. 76-213

Supreme Court, U. S.
FILED
OCT 1
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

BYRON L. DORGAN, ETC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND WESTERN ELECTRIC COMPANY, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,

SCOTT P. CRAMPTON,
Assistant Attorney General,

LEONARD J. HENZKE, JR.,
ALFRED S. LOMBARDI,
Attorneys,
Department of Justice,
Wasnington, D.C. 20530.

FRANK J. MAGILL,
Niles, Hansen, Selbo, Magill & Davies, Ltd.,
700 Metropolitan Building,
P. O. Box 2626,
Fargo, North Dakota 58102,
Counsel for Western Electric Company, Incorporated.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-213

BYRON L. DORGAN, ETC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND WESTERN ELECTRIC COMPANY, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and Western Electric Company, Incorporated, move that the order of the district court be affirmed.

STATEMENT

This is a direct appeal from the memorandum and order of a three-judge district court (J.S. App. A-1 to A-8) enjoining appellants, the State Tax Commissioner of the State of North Dakota and related officials, from assessing and collecting state taxes, pending a final determination by the federal courts whether the United States and Western Electric Company are immune from such taxes under the Supremacy Clause of the Constitution.

The pertinent facts may be summarized as follows: The United States Department of the Army contracted with Western Electric to design and install certain equipment at "Safeguard System" missile bases in North Dakota

(J.S. App. C-2). Under the contract, the United States is obligated to reimburse Western Electric for state sales and use taxes which it is obligated to pay with respect to property acquired for the performance of the contract (J.S. App. A-5).

The North Dakota tax officials announced their intention to impose sales and use taxes upon Western Electric because of its acquisition of property under its contract with the Army. The United States and Western Electric then brought an action in the United States District Court for the District of North Dakota for a declaratory judgment that the state taxes were barred by the constitutional immunity of the federal government. The following day, Western Electric received from the state a "Notice of Determination," asserting that it owed more than 54 million dollars in sales and use taxes, and that the tax would become final unless Western Electric applied for an administrative hearing (J.S. App. C-2).

Before any state administrative hearing was held, a single-judge district court, upon application of the United States and Western Electric, stayed the state tax proceedings pending the outcome of the federal declaratory judgment action (J.S. App. B-1 to B-12, C-2 to C-3). However, the court of appeals held that under 28 U.S.C. 2281, a single judge had no jurisdiction to stay the state tax proceedings. It accordingly vacated the stay and remanded the case to the district court for further proceedings (J.S. App. C-1 to C-12).

The United States and Western Electric renewed their request for a stay of the state proceedings before a three-judge district court. After a hearing, the court stayed the state tax administrative proceedings pending the outcome

of the federal declaratory judgment action (J.S. App. A-7).[1]

ARGUMENT

The three-judge district court correctly enjoined further state tax enforcement proceedings pending disposition of the federal immunity suit in the federal court.

1. As the district court recognized (J.S. App. A-4), it is well settled that the United States has the right to litigate its immunity from state taxation in a federal court. *Board of Commissioners of Pawnee County, Okl.* v. *United States*, 139 F. 2d 248, 250-251 (C.A. 10); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 227-228; see 28 U.S.C. 1345. Thus, where, as here, the United States brings suit in a federal court for a declaratory judgment of its tax immunity, the federal court has broad discretion to enjoin state tax proceedings which would conflict with the authority of the federal court and thereby irreparably injure the federal government. *Leiter Minerals, Inc.* v. *United States, supra*, 352 U.S. at 226-227, affirming 224 F. 2d 381, 384 (C.A. 5); *Deckert* v. *Independence Corp.*, 311 U.S. 282; *United States* v. *Corrick*, 298 U.S. 435, 437-438. See also *Eden Memorial Park Ass'n* v. *United States*, 300 F. 2d 432, 437 (C.A. 9); *United States* v. *Department of Revenue of State of Illinois*, 191 F. Supp. 723, 726-727 (N.D. Ill.), vacated on other grounds, 368 U.S. 30; *United States* v. *Okaloosa County, Fla.*, 59 F. Supp. 426 (N.D. Fla.).[2]

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[1]The court did not stay certain audit and other preliminary activities of the North Dakota tax officials (J.S. App. A-8).

[2]*Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602, upon which appellants rely (J.S. 20), is consistent with the decision below. There, a federal court enjoined the collection of a state tax during the pendency of a state court proceeding (*id.* at 604). While the validity of

There is ample support for the district court's finding (J.S. App. A-2 to A-4) that the United States and Western Electric will sustain irreparable injury unless the state tax proceedings were stayed. As the court explained (J.S. App. A-4 to A-5), if the state tax proceedings were permitted to go forward, any state court decision that Western Electric was liable for the taxes might be *res judicata* in the federal action and possibly require the United States to reimburse Western Electric under their contract. Although appellants argue (J.S. 18) that the United States could intervene in the state tax proceedings, they ignore the settled right of the United States to litigate its state tax immunity in federal court.[3]

Moreover, in the absence of a stay, the parties could be subject to conflicting judgments. As the district court stated (J.S. App. A-5 to A-6), if the state tax proceedings were not enjoined, Western Electric might be held liable for the state taxes, while the federal courts might hold the United States immune.

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the tax was litigated in the state courts, that procedure was employed at the direction of this Court, which first ruled that the determination of state law might make it unnecessary to decide the federal constitutional questions. See *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101. Here, however, the ultimate question is one of federal tax immunity.

[3]Contrary to appellants' argument (J.S. 19-20), it is not appropriate for the federal court to abstain from exercising its jurisdiction pending state court disposition in a case where the United States asserts its immunity from state taxes on the basis of federal law. *American Nat. Red Cross* v. *Department of Employment*, 263 F. Supp. 581, 585 (D. Colo.) (three-judge court), affirmed *sub nom. Dept. of Employment* v. *United States*, 385 U.S. 355, 357-358. Moreover, none of the traditional bases for abstention from federal jurisdiction is present here. *Colorado River Water Conservation Dist.* v. *United States*, No. 74-940, decided March 24, 1976, slip op. 12-15.

Although appellants apparently concede (J.S. 16-17) that without a stay the United States might have to reimburse Western Electric for any state taxes held to be due, they nevertheless contend that such payment would not constitute irreparable injury. But assuming *arguendo* that the United States could eventually recover the tax payments as a result of a federal court judgment recognizing its immunity from state taxation, the temporary payment of the deficiency in this case, which exceeds $54 million, would constitute irreparable injury to the federal government. *Board of Commissioners of Pawnee County, Okl.* v. *United States, supra*, 139 F. 2d at 251; *United States* v. *Livingston*, 179 F. Supp. 9, 12 (E.D.S.C.), affirmed, 364 U.S. 281; *City of Springfield* v. *United States*, 99 F. 2d 860, 862 (C.A. 1). Here, as in the cited cases, the undisputed evidence shows that a Congressional appropriation would be necessary to pay the state taxes (Affidavits of Maj. Gen. Richard L. West and Col. Harris W. Woods, filed in the district court, Appendix, *infra*, pp. 1a-5a).

The district court also correctly found (J.S. App. A-6) that there was a strong likelihood that the United States and Western Electric would succeed on the merits of their claim of immunity. Here, the government's claim to immunity rests upon the argument that Western Electric purchased materials on behalf of the United States and that title to these goods immediately vested in the United States. See, *e.g.*, *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 117. Moreover, the North Dakota tax appears to favor contractors who deal with the state so as to discriminate against the United States and those with whom it deals. See *Phillips Co.* v. *Dumas School District*, 361 U.S. 376. In light of the authorities in support of the immunity claim and the fact that the $54 million tax deficiency was asserted by the State of North Dakota on the basis of an estimate without an audit (J.S. App. A-6), there was ample basis for the district

court to conclude that there is a substantial probability that the government and Western Electric would be able to show that all or a part of the taxes assessed were not owed.

3. Finally, appellants contend (J.S. 12-13, 19) that the district court's eight-page memorandum and order (J.S. App. A) does not comply with Rules 52(a) and 65(d) of the Federal Rules of Civil Procedure. However, the necessary factual findings, which are set forth in memorandum form, are in accord with the requirements of Rule 52(a). *McCawley* v. *Ozeanosun Compania, Maritime, S.A.*, 505 F. 2d 26, 30, n. 4 (C.A. 5); *Ass'n of Westinghouse Sal. Emp.* v. *Westinghouse E. Corp.*, 283 F. 2d 93 (C.A. 3). The memorandum and order likewise complies with Rule 65(d) because: (1) it sets forth the reasons for issuance of the stay (the avoidance of irreparable injury and the right of the federal government to litigate its tax immunity in the federal courts); (2) it is specific in its terms (restraining specific aspects of the state's administrative tax proceedings); and (3) it describes in detail the acts restrained (the administrative proceedings but not the audit).

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

LEONARD J. HENZKE, JR.,
ALFRED S. LOMBARDI,
Attorneys.

FRANK J. MAGILL,
Niles, Hansen, Selbo, Magill & Daves, Ltd.,
Counsel for Western Electric Company, Incorporated.

OCTOBER 1976.

DOJ-1976-10

APPENDIX

AFFIDAVIT

COMMONWEALTH OF VIRGINIA)

) SS.

COUNTY OF ARLINGTON)

MAJOR GENERAL RICHARD L. WEST, U.S. Army, being first duly sworn, deposes and says:

I am the Director of Army Budget, Office of the Comptroller of the Army, Headquarters, Department of the Army, Washington, D.C. I have occupied this position since 24 July 1974. I am responsible for the formulation and execution of the Army budget. I am also responsible for the development and establishment of the Army's overall integrated budgeting and funding policies. This function includes the requirements and specifications for budget management systems and the processes needed for appropriations and funds accounts administration.

I understand that the North Dakota Tax Commissioner has sought to impose a sales and use tax liability against Western Electric and its major subcontractors in an amount in excess of $68 million incident to their performance of the SAFEGUARD contract in North Dakota. I also understand that the SAFEGUARD contract requires the Army to reimburse Western Electric and its major subcontractors for all allowable costs incurred incident to contract performance, including any and all state and local taxes properly due and owing. I further understand that there are insufficient funds within the SAFEGUARD program to pay a $68 million tax assessment.

For each fiscal year, Congress makes specific appropriations for the Army based on detailed justification and cost breakdowns presented in support of budget requests. These appropriations are made under separate headings, each has a title and language describing the purpose as well as the time period for which the appropriation made thereunder is available. The major appropriations for the Army are as follows:

1. Research, Development, Test and Evaluation (RDTE) - two year availability.

2. Procurement (PROC) for aircraft, missile, wheeled vehicles, ammunition and others - three year availability.

3. Operation and Maintenance - one year availability.

4. Military Personnel (MPA) - one year availability.

5. Military Construction (MCA) - continuing availability.

Congress has insisted on maintaining the integrity of appropriations (see 31 U.S.C. 628). However, with Congressional approval, the Army may divert or "reprogram" funds from the specific purpose for which they were originally appropriated to a different use.

Based on data and information available to me, I have concluded that the $68,000,000 tax liability described above could not be paid by funds from other Army activities, since such funds have already been obligated, spent or are identified for programs approved by the Congress in authorization and appropriation actions. Reprograming does not appear to be an alternative course of action because a request to Congress to approve reprograming of funds from other appropriations must include a certification that the request is for an activity of unforeseen military necessity and of a higher priority than the activity from which funds are deleted. This would clearly not

be the case in this instance. If such a liability is ultimately determined to be due and owing North Dakota, the Army could only request that Congress appropriate funds for the payment of such sum.

The foregoing instrument was sworn and subscribed before me this 1st day of April, 1976.

(signed) R. L. West

RICHARD L. WEST

(signed) Ethel Florain Lucas

Notary Public

My commission expires 12 Dec. 78

AFFIDAVIT

COMMONWEALTH OF VIRGINIA)

) SS.

COUNTY OF ARLINGTON)

COLONEL HARRIS W. WOODS, U.S. Army, being first duly sworn, deposes and says:

I am the Chief of Budget and Manpower Office, Ballistic Missile Defense (BMD) Program Office at Arlington, Virginia. I serve as the primary staff officer for planning, programing and budgeting for the financial and manpower resources authorized and required for the BMD programs, including SAFEGUARD. On behalf of the BMD Program Manager, I manage and control the distribution and use of all financial and manpower resources approved by the Congress and the Office of Secretary of Defense for the BMD programs. Since 23 July 1971 I have been responsible for budgetary and financial matters for the BMD Organization.

I understand that the North Dakota Tax Commissioner has sought to impose a sales and use tax liability against Western Electric and its major subcontractors in an amount in excess of sixty-eight million dollars ($68,000,000) incident to their performance of the SAFEGUARD contract in North Dakota. I further understand that the SAFEGUARD contract requires the Army to reimburse Western Electric and its major subcontractors for all allowable costs incurred incident to contract performance, including any and all state and local taxes properly due and owing.

Of the money appropriated from year to year by Congress to finance the SAFEGUARD program, all of such money except a remnant thereof has either been paid out for work performed or is now owing for work which has been performed. The remnant referred to in the preceding sentence is an amount far less than the $68,000,000 amount alluded to in the preceding paragraph. If this $68,000,000 were ultimately determined to be due and owing to the State of North Dakota, then, to the best of my knowledge and belief, only after a new appropriation by Congress for the payment of such amount could this amount be paid.

(signed) Harris H. Woods

HARRIS H. WOODS

The foregoing instrument was sworn and subscribed before me on the twenty-fifth day of March, 1976.

(signed) Virginia P. Lessenger

VIRGINIA P. LESSENGER
Notary Public
Arlington County, Virginia

My Commission expires on
July 23, 1978

Supreme Court, U. S.
FILED
OCT 12 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-213

BYRON L. DORGAN, as State Tax Commissioner of and for the State of North Dakota, and his successors in office; STATE TAX COMMISSION OF THE STATE OF NORTH DAKOTA; and STATE OF NORTH DAKOTA,

Appellants

vs.

UNITED STATES OF AMERICA and WESTERN ELECTRIC COMPANY, INCORPORATED,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM

COUNSEL OF RECORD FOR ALL APPELLANTS, AND UPON WHOM SERVICE IS TO BE MADE:

KENNETH M. JAKES
Special Assistant Attorney General for the State of North Dakota
Office of the State Tax Commissioner
State Capitol
Bismarck, ND 58505

OTHER COUNSEL OF RECORD FOR ALL APPELLANTS:

ALBERT R. HAUSAUER, ROBERT W. WIRTZ
Special Assistants Attorney General for the State of North Dakota
Office of State Tax Commissioner
State Capitol
Bismarck, ND 58505

October, 1976

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-213

Byron L. Dorgan, etc., et al, Appellants

v.

United States of America and Western Electric Company, Incorporated

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

APPELLANTS' BRIEF OPPOSING MOTION TO AFFIRM

Pursuant to Rule 16(4) of the Rules of this Court, Byron L. Dorgan, et al, submit this Appellants' brief opposing the motion to affirm the order of the district court.

SCOPE OF TAX CLAIM

On page 2 of their motion to affirm, the United States and Western Electric imply that North Dakota sales and use taxes are claimed only with respect to property acquired by Western Electric for performance of its contract with the United States Department of the Army. The claim of North Dakota for such taxes is not limited to property acquisitions by Western Electric but extends also to various services, such as utility services, purchased by Western Electric (J.S. 7, App. A-4 and A-5, and App. D-10 through D-13). This goes to the merits of the argument on page 5 of the motion to affirm where the appellees assert that "the government's claim to immunity rests upon the argument that Western Electric purchased materials on behalf of the United States and that title to these goods immediately vested in the United States." How does title to such services as telephone service and electricity purchased by Western Electric immediately vest in the United States? Could the district court's finding of substantial probability of success on the merits by the United States and Western Electric, which is one of the traditional prerequisites for injunctive relief (J.S. App. A-2), have been based on immediate vesting in the United States of title

to services purchased by Western Electric? That is unlikely not only on the face of it but for other reasons hereinafter set out under the heading "Claim of Agency".

CLAIM OF IRREPARABLE INJURY

On pages 4 and 5 of their brief the United States and Western Electric argue that the United States would sustain irreparable injury unless the state tax proceedings were stayed because of the possibility of conflicting judgments in the federal and state proceedings that would require the United States to make temporary payment of a substantial sum to Western Electric and that the temporary payment could not be made without first obtaining a congressional appropriation.

The United States would sustain irreparable injury only if payment of the taxes claimed was required by North Dakota law as a condition to contesting their validity in the State's courts. Such is not the case here. Payment of disputed sales and use taxes is not required as a condition precedent to contesting their validity in a North Dakota administrative tax proceeding, nor is it required in a direct action in the North Dakota courts for a declaratory judgment pursuant to Chapter 32-23 of the North Dakota Century Code. See The Boeing Company and the United States v. Omdahl, 169 N.W. 2d 696, (N.D., 1969), the merits of which paralell substantially the merits of this case. The argument that the United States would make a temporary payment to Western Electric for disputed state taxes before a

final determination is had in the federal courts on the claim of sovereign immunity is not realistic as an argument to show irreparable injury to the United States; it is inconceivable to the appellants that the United States would ever make such a temporary payment under those circumstances. The three cases cited in the motion to affirm, on page 5, to support the claim of irreparable injury to the United States are distinguishable because they dealt with either or both of the following: first, a district court order granting a permanent injunction that was based on an unequivocal holding that the state statute involved was unconstitutional, whereas in this case only a temporary injunction based on probable unconstitutionality of the North Dakota statutes is involved; and, second, a district court order granting an injunction because a state statute required prepayment of the taxes and a suit in state court for refund of those taxes as the means of testing their validity, whereas in this case prepayment of the North Dakota sales and use taxes is not required as a condition precedent to testing their validity either in a state administrative proceeding or directly in state court via an action for declaratory judgment.

CLAIM OF AGENCY

On page 5 of their motion the United States and Western Electric argue that:

> "The district court also correctly found (J.S. App. A-6) that there was a strong likelihood that the United

States and Western Electric would succeed on the merits of their claim of immunity. Here, the government's claim to immunity rests upon the argument that Western Electric purchased materials on behalf of the United States and that title to these goods immediately vested in the United States. See, e.g., Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110,117."

Their argument that Western Electric "purchased materials on behalf of the United States", together with their citation of Kern-Limerick, is a clear claim now that Western Electric was acting as an agent of the United States for the purpose of purchasing the materials. This is exactly contrary to their argument in the district court where they specifically informed the court that they were not claiming that Western Electric acted as agent of the United States for the purchase of the materials, presumably because the contract expressly provides that Western Electric, "as an independent contractor and not as an agent of the Government", would furnish the services and supplies described in the contract. (J.S. 6)

Their disclaimer of agency to the district court was made to dispute the statement by the Eighth Circuit Court of Appeals in the related case of United States and Western Electric v. Dorgan, et al, 522 F. 2d 969, that:

"In essence they argue that Western Electricacts under the contract as a federal instrumentality and therefore enjoys the immunity of the Federal Government." See J.S. App. C-2.

No where in its memorandum opinion did the district court suggest that its conclusions were based on such an agency relationship as is now claimed by the United States and Western Electric, but the quotation above from page 5 of the motion to affirm implies otherwise.

The contract here is between the United States Department of the Army and Western Electric and the justification for their claim that Western Electric was an agent of the United States for the purchase of the materials is indeed difficult to understand, not only for the reasons set out above but because of the policy of the United States Department of the Defense against agency-creating clauses in its contracts; in this regard, see the memorandum opinion, filed on July 1, 1976, by the United States District Court for the District of New Mexico in No. 75-425-B Civil, United States of America v. State of New Mexico, et al, (not yet reported), from which the following is quoted from pages 7 and 8 of the opinion as filed:

"It should be noted that, had the Army intended to create an agency relationship, it could easily have put appropriate language in the contracts, as was done in the Kern-

Limerick contract. 347 U.S. at 112, n. 2. It did not do so. It should also be noted that exhibits filed in this action reveal that, at least since 1955, it has been the policy of the Department of Defense not to include in its contracts agency-creating clauses to avoid state and local taxes otherwise payable by its contractors."

That policy of the Defense Department undoubtedly was instrumental in persuading the Congress in 1957 and 1958 to not enact legislation that would have prohibited agency creating clauses in federal contracts and thereby remove the use of them as a device for avoidance of state and local taxes imposed with respect to activities of federal contractors. See the report of the June 11 and 12, 1957, "Hearings Before A Subcommittee Of The Committee On Government Operations United States Senate, Eighty-Fifth Congress, First Session, On S. 6, A Bill To Eliminate Claims Of Immunity From State And Local Taxes Based On Contracts With The United States Or Its Agencies Or Instrumentalities", which hearings were held because of the holding in Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, and in which report, on page 75, testimony on behalf of the Secretary of Defense included the following:

> "The Department of Defense has established a firm policy against designating contractors on contracts to be performed within the United States as agents of the Government

> for the purchase of supplies and with the right to pledge the credit of the Government in order to avoid the imposition of taxes."

This agency argument by the United States and Western Electric now adds a new dimension to the questions submitted on this appeal because they involve, not only for North Dakota but also for most other states, first, a substantial state interest in the enforcement of state sales and use tax laws against Defense Department contractors and, second, grave questions of public importance as to whether the Department of Defense is acting contrary to its long standing established policy against designating its contractors as agents of the Government for the purchase of supplies in order to avoid payment of state sales and use taxes by its contractors.

CONCLUSION

For these reasons and for the reasons set out in the Jurisdictional Statement, the Appellees' motion to affirm should be denied and the order of

the district court granting the stay (preliminary injunction) should be vacated.

Respectfully submitted,

Kenneth M. Jakes

COUNSEL OF RECORD FOR ALL APPELLANTS:
Special Assistant Attorney General for the State of North Dakota
Office of the State Tax Commissioner
State Capitol
Bismarck, North Dakota 58505

OTHER COUNSEL OF RECORD FOR ALL APPELLANTS:
Albert R. Hausauer and Robert W. Wirtz
Special Assistant Attorneys General for the State of North Dakota
Office of State Tax Commissioner
State Capitol
Bismarck, North Dakota 58505

October, 1976